Supreme Court, U.S.
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No. 09-____

Supreme Court of the United States

COMMONWEALTH OF KENTUCKY,
Petitioner,

v.

EDDIE CARDINE AND MICHAEL CURRY,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Kentucky

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Double Jeopardy Clause bars the retrial of a defendant after the trial court *sua sponte* declares a mistrial absent manifest necessity and the defendant does not object prior to the actual discharge of the jury.

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PETITION FOR A WRIT OF CERTIORARI

The Commonwealth of Kentucky respectfully petitions for a writ of certiorari to review the judgment of the Kentucky Supreme Court in this case.

OPINION BELOW

The Supreme Court of Kentucky's opinion is reported as *Cardine v. Commonwealth*, 283 S.W.3d 641 (Ky. 2009). Petitioner's Appendix ("App.") 1a–25a.

STATEMENT OF JURISDICTION

The Supreme Court of Kentucky rendered the judgment from which relief is sought on January 22, 2009. App. at 1a. Petitioner timely filed a petition for rehearing on February 11, 2009, which was denied on June 25, 2009. App. at 26a-27a. Petitioner sought, and was granted, a two week extension in which to file this petition, up to and including October 7, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb. . . ." U.S. Const. Amend. V.

STATEMENT OF THE CASE

1. The Respondents, Eddie Cardine and Michael Curry, were charged with complicity to murder, two

counts of complicity to attempted murder, complicity to assault in the first degree, and complicity to assault in the second degree. The charges arose from a confrontation between Cardine and Curry and four men. As a result of the confrontation, one man was killed and two others injured.

At the first trial, a jury was selected and sworn. That jury was then excused from the courtroom while the parties argued pretrial motions. It was during these pretrial arguments that the Commonwealth informed the court that it had discovered a new witness. This new witness, Mr. Hebert, had previously been unknown to the Commonwealth and was only discovered after the jury had been sworn. Hebert was important to the Commonwealth, since he was the only disinterested person who could place a gun in Curry's hand. Defense counsel objected to admitting Hebert's testimony, arguments ensued, defense counsel interviewed Hebert, and Hebert was sworn to reappear. The jury, having now been given a lunch break, was not in the courtroom during any of these activities.

After the break, with the knowledge that the issue would require further discussion, the trial court dismissed the jurors for the day and requested they return the next morning. All remaining arguments regarding the course of action in this case took place outside the presence of the jurors, who remained sworn but were not in the courthouse at the time.

Defense counsel eventually requested that the court exclude the new witness or, in the alternative, allow a continuance. The Commonwealth argued that although a continuance might be appropriate, exclusion of the witness was not:

> *Counsel for Curry*: [I]f the court overrules my motion, excluding the witness Mr. Hebert, then I move for a continuance of a new trial date, so that we have time to investigate and ensure that our defense theory, may or may not change, based on the evidence that was – at least the information that came from Mr. Hebert today. So that I move the court for a continuance if the court doesn't grant my motion to exclude Mr. Hebert at this time.
>
> *Counsel for Cardine*: I would object to a, I think I heard some discussion, I don't think it was on record about a short continuance. I would object to that, I would either like to exclude that evidence or continue it for a further trial date with a significant period of time.

In response to the arguments, the judge ruled that the testimony was admissible and not a discovery violation. Nonetheless, the judge ordered a mistrial, explicitly in response to defense counsel's assertion that a short continuance would provide insufficient time to prepare. Defense counsel did not object, but participated fully in setting a new trial date and requesting bond relief. In reference to the period of time necessary to prepare for the newly discovered witness, the parties stated:

> *Judge:* I don't know how much time you are seeking, from the defense standpoint, as far as time you need to get ready. Do you have any idea?

Counsel for Curry: Just next available trial date.

Judge: Well next available trial date is next year, so, and still may be next year, but I don't know, for example, how quickly that you are looking at your schedule to allow.

Following this discussion, there was a conversation regarding everyone's calendars while the court tried to reschedule the case. Defense counsel then requested bond relief:

Counsel for Cardine: Your Honor, in light of the continuance we are now getting it would also be my motion for bond relief on behalf of Eddie Cardine.

After the parties discussed bond relief for both defendants, they went to the judge's office to get a new trial date. The next morning, the jury was called back to court and released from service.

2. In the second trial, Respondents were both found guilty and sentenced to thirty years. Although neither one raised the issue in the trial court, on appeal Cardine argued that the second trial had violated his double jeopardy rights under the Fifth and Fourteenth Amendments to the United States Constitution. The Commonwealth responded that the defendant had consented to the court's *sua sponte* order by his actions both before and after the judge announced her intent to declare a mistrial. Curry did not raise the double jeopardy claim on appeal, but the Kentucky Supreme

Court nevertheless treated the two defendants alike for purposes of the double jeopardy claim.

By a 4-2 vote, the Kentucky Supreme Court reversed the convictions on the ground that they violated the federal Double Jeopardy Clause. The court first found no manifest necessity justified the mistrial declaration because there had been no violation of discovery rules and Hebert's testimony was merely cumulative and therefore not necessary. After finding no manifest necessity, the court turned its attention to whether the defendants consented to a mistrial.

The Commonwealth had argued that the defendants' failure to object, both before and after the lower court announced its intention to declare a mistrial, was proof of the defendants' consent thereto. The court, however, flatly stated that "the defense does not have to object to a mistrial." App. 19a. The court reasoned that a party does not need to object when it has no opportunity to do so, but it did not take into account that the defense actively participated in scheduling a new trial and sought bond relief before the jury was discharged. Indeed, as soon the word mistrial was spoken by the judge, the Kentucky Supreme Court decided "the time for argument was over and the Appellant simply could not have waived his opportunity to object when he was never given such an opportunity." App. 20a (quoting *Radford v. Lovelace*, 212 S.W.3d 72, 77 (Ky. 2006)) (internal quotation marks and brackets omitted).

The court also explained:

> [I]t simply does not make sense to require a criminal defendant to object to a mistrial. If the

> trial judge improperly grants a mistrial, as in this case, such a rule would require the defense attorney to risk forgoing a win for his client if the objection was sustained. Forcing the defense to risk snatching defeat from certain victory is impermissible in light of the adversarial nature of our justice system and the ethical requirements of zealous competent advocacy.

The court concluded that "[i]t is the Commonwealth whose interests are harmed by an improper, *sua sponte* mistrial."and therefore the Commonwealth's duty to object. App. 21a.

The Commonwealth sought rehearing of the Kentucky Supreme Court's opinion, which was denied on June 25, 2009. App. 26-27.

REASONS FOR GRANTING THE WRIT

This Court has long held that a defendant's right not to be placed twice in jeopardy is not violated when he is retried following a mistrial based on manifest necessity. *United States v. Perez*, 22 U.S. 579, 580 (1824). When a mistrial is declared absent manifest necessity, the general rule is that the Double Jeopardy Clause bars a retrial of the defendant. *Arizona v. Washington*, 434 U.S. 497, 505 (1978). A major exception to that rule, however, is when a defendant consents to the court's declaration of a mistrial. If a defendant so consents, he may be retried regardless of whether there was manifest necessity for the mistrial. *United States v. Dinitz*, 424 U.S. 600, 607-610 (1976).

At issue in this case is whether a defendant consents to a mistrial by failing to object after the trial court *sua sponte* declares one. Most courts have held that a defendant has the opportunity to object until the jury is discharged, and his failure to do so constitutes consent. The Kentucky Supreme Court, by contrast, held that a defendant, as a matter of law, has no opportunity to object following a *sua sponte* mistrial, and that failure to object before the jury is discharged may not be deemed consent. Indeed, the Kentucky Supreme Court went further and reasoned that it is defense counsel's responsibility to a client — *not* to object, thereby "preserving" the violation of the defendant's constitutional right. Certiorari should be granted to resolve this conflict among the courts and because the Kentucky Supreme Court's decision cannot be reconciled with this Court's decisions regarding the nature of double jeopardy rights and the obligation of defendants to assert contemporaneous objections to trial court decisions that violate their constitutional rights.

A. The Kentucky Supreme Court's Decision Conflicts With Decisions Of Numerous Federal Courts Of Appeal And State Supreme Courts

In *Gori v. United States*, 367 U.S. 364, 365 n.6 (1961), this Court expressly left open the question whether a defendant's failure to object to a mistrial may bar a later claim of double jeopardy. *Id.* at 365, n.6. In the absence of a ruling by this Court, the lower courts have reached conflicting results on the question

presented. This absence has allowed for divergent outcomes, depending upon the jurisdiction in which the case is heard. Only this Court can establish a uniform rule on these constitutional issues.

In this case, the jury was not present when the trial court declared a mistrial, and would not return until the following morning. Defense counsel therefore had ample opportunity to object to the court's declaration. The Kentucky Supreme Court nonetheless reasoned that counsel had no obligation or opportunity to object to preserve a later double jeopardy claim. The New Hampshire Supreme Court and the Florida Court of Appeals have likewise held that a defendant's failure to object following the *sua sponte* declaration of a mistrial does not amount to consent. See *State v. Bertrand*, 587 A.2d 1219, 1225 (N.H. 1991) ("a defendant generally cannot consent to a mistrial by silence"); *Joseph v. State*, 988 So. 2d 133, 135 (Fl. App. Ct. 2008) ("A defendant's silence or failure to object to an illegal discharge of a jury does not constitute consent to a declaration of mistrial and it does not waive a defendant's constitutional protection against double jeopardy"). By contrast, numerous federal courts of appeal and state supreme courts have reached the opposite conclusion.

1. The First and Seventh Circuits have held that a defendant does have the opportunity to object following a court's *sua sponte* mistrial declaration and that failure to object constitutes consent. For example, in *United States v. DiPietro*, 936 F.2d 6 (1st Cir. 1991), the defendant requested a curative instruction in response to statements made in the government's closing argument. The trial court agreed to give the curative

instruction, but later became concerned about the nature of the objectionable statements. As a result, the court *sua sponte* declared a mistrial and excused the jury. In finding the defendant consented to the mistrial, the First Circuit reasoned that even if defense counsel had not expected the mistrial, there was ample opportunity to object when the mistrial was declared:

> For several minutes after the decision was announced, she and the government counsel and the trial judge remained in the courtroom. She listened to the court's record explanation of the reason for a mistrial and did not object. She formulated and stated a motion for judgment of acquittal and did not object to the mistrial. Finally, she consulted her calendar and discussed with the court and government counsel acceptable dates for a new trial, and scheduled the trial.

Id. at 11. Although the jury had been released, the First Circuit reasoned that upon defense counsel's immediate objection, the jury could have been asked to remain while the judge reconsidered his order. The court of appeals found defense counsel's actions to be tantamount to consent.

The Seventh Circuit applied the same approach in *Camden v. Circuit Court of Second Judicial Circuit, Crawford County, Ill.*, 892 F.2d 610 (7th Cir. 1989), *cert. denied*, 495 U.S. 921 (1990). In that case, the trial court *sua sponte* declared a mistrial in the presence of the jury. Before discharging the jury, the court made clear that there would be a second trial. The Seventh

Circuit held that the defendant impliedly consented to the mistrial by failing to object to the mistrial or retrial, and instead remained silent. The court of appeals reached that conclusion even though (in contrast to the instant case) the defendant had a very limited opportunity to object.

> Here, the opportunity to salvage Camden's trial by objecting to the mistrial declaration terminated upon the dismissal of the jury. Nonetheless, defense counsel's active assistance in arranging Camden's retrial and his failure to object on the record even after the mistrial declaration and dispersal of the jury provide strong evidence that his silence during the mistrial declaration constituted agreement that a mistrial was necessary.

Id. at 616, n.7.

Although not directly addressing the timing of the objection, the Fourth and Eleventh Circuits apply a similarly strict standard: if the opportunity to object exists in any manner, and a defendant fails to do so, he or she is deemed to have consented. *See United States v. Ham*, 58 F.3d 78 (4th Cir. 1995), *cert. denied*, 516 U.S. 986 (1995); *United States v. Puelo*, 817 F.2d 702 (11th Cir. 1987), *cert. denied*, 484 U.S. 978 (1987). Massachusetts also applies this strict standard. See, e.g., *Pellegrine v. Commonwealth*, 844 N.E.2d 608 (Mass. 2006).

Another group of courts, the Second, Fifth, and Sixth Circuits, apply a "totality of the circumstances" test to determine whether a defendant consented when

he failed to object following a *sua sponte* mistrial. *See* *Maula v. Freckleton*, 972 F.2d 27 (2nd Cir. 1992), *cert. denied*, 507 U.S. 910 (1993) (totality of the circumstances); *United States v. Nichols*, 977 F.2d 972 (5th Cir. 1992) *cert. denied*, 510 U.S. 833 (1993), (implied consent by failing to object and scheduling new trial date); *United States v. Gantley*, 172 F.3d 422 (6th Cir. 1999) (failure to object following *sua sponte* mistrial declaration was positive indication of implied consent to the mistrial where counsel had the opportunity to speak to the judge before the jury returned to be discharged). Missouri follows this approach. See *State v. Tolliver*, 839 S.W.2d 296 (Mo. 1992) (no objection during bench conference before judge went back on record to dismiss the jury).

The Third Circuit looks to specific factors that illustrate consent. *Love v. Morton*, 112 F.3d 131 (1997) (no opportunity to object, and therefore no consent to mistrial, where judge immediately left the bench after the declaration).

Finally, the Ninth Circuit implies consent to a mistrial "only where the circumstances positively indicate a defendant's willingness to acquiesce in the mistrial order." *United States v. You*, 382 F.3d 958, 964-65 (9th Cir. 2004), *cert. denied*, 543 U.S. 1076 (2005) (quoting *Weston v. Kernon*, 50 F.3d 633 (9th Cir. 1995), *cert. denied*, 516 U.S. 937 (1995)).

What is consistent among all these courts is that they require a defendant to object to a *sua sponte* mistrial declaration in order to assert a later double jeopardy claim unless circumstances exist which would explain a failure to object. The instant case would have been decided differently in all of those courts.

Moreover, the holdings of those courts reflect a profound disagreement with the Kentucky Supreme Court's assertion that "it simply does not make sense to require a criminal defendant to object to a mistrial." because to object might be to forego a future "win" on double jeopardy grounds. App. 20-21a. In each of the cases cited above, the federal court of appeals held that defense counsel was obligated to object to a mistrial if the judge was present and the jury not yet discharged. These courts did not view such an objection as "snatching defeat from certain victory," but rather as properly attempting to preserve a defendant's right to have his case heard by his first jury.

2. In concluding that defense counsel lacked the opportunity to object to the court's mistrial declaration, the Kentucky Supreme Court confused the trial court's announcement that it intended to declare a mistrial with the mistrial itself, i.e., the actual discharge of the jury. Other courts have specifically recognized that the oral announcement of mistrial is not the mistrial itself, and that the case remains open until the jury has actually been discharged. See, *e.g.*, *United States v. Razmilovic*, 507 F.3d 130, 14142 (2nd Cir. 2007); *Creighton v. Hall*, 310 F.3d 221, 228 (1st Cir. 2002), *cert denied*, 538 U.S. 933 (2003); *Camden v. Circuit Court*, 892 F.2d 610, 616 n.7 (7th Cir.1989), *cert. denied*, 495 U.S. 921 (1990); *United States v. Smith*, 621 F.2d 350, 352 n.2 (9th Cir.1980). And the federal and state appellate decisions discussed above impliedly recognize that the case remains open until the jury has actually been discharged.

Had the Kentucky Supreme Court analyzed this case using any of the standards regarding implied consent applied in the federal circuits, the court would have upheld the convictions. Certainly there was ample time for the defense to express its position on mistrial. The parties were in the courtroom for several minutes after the court declared the mistrial. The jury was not present for the declaration or for any of the discussion regarding the mistrial. Although time was available, and although the judge herself had pointed out that the jury had been sworn, instead of objecting to what the Kentucky Supreme Court called an "abrupt declaration," defense counsel engaged in discussions about a convenient trial date and whether the court would reduce bond before the new trial. Until the appeal of the convictions from the second trial, no Kentucky court was aware of any objection to the trial court's order. The absence of any objection in those circumstances would have been deemed consent in the federal circuits and state supreme courts addressed above.

Whether, and under what circumstances, to imply consent from silence are issues which have not been settled by this Court. The Kentucky Supreme Court's opinion is a prime example of how each jurisdiction has been free to develop its own standard. Whether a right under the Constitution has been waived should not be dependent upon the jurisdiction in which the case is heard. Jurisdiction should not determine application of the Constitution. Free of many of the factual complications apparent in other implied consent cases, the Kentucky opinion represents a case which would permit this Court to provide the simple

pronouncements regarding consent and waiver which are necessary in order to ensure uniform application of the Constitution and orderly administration of justice.

B. The Kentucky Supreme Court's Decision Is Contrary To This Court's Precedent Holding That Double Jeopardy Protection Belongs To The Defendant.

The Kentucky Supreme Court failed to understand the nature of the right which may be waived and the harm which occurs from twice being placed in jeopardy. The logic of looking to the defendant's actions for consent after a court makes an oral declaration of mistrial flows from the right protected and the time at which the right can no longer be vindicated. The harm is the loss of the first tribunal. As this Court has repeatedly stated, a trial which ends in a mistrial denies a defendant the "valued right to have his trial completed by a particular tribunal." *Wade v. Hunter*, 336 U.S. 684, 689 (1949). Once the jury is released, the ability to get the case resolved by that particular tribunal is forever lost, but it is not lost until then. By holding that a defendant need not and may not object to a *sua sponte* mistrial declaration after it is announced but before the jury is discharged, the Kentucky Supreme Court created an arbitrary and illogical end point to the protection of the right to trial by the first tribunal.

The double jeopardy guarantees of the Fifth Amendment involve personal rights which may be waived by a defendant. As this Court stated in *United*

States v. Dinitz, the important consideration, for purposes of the Double Jeopardy Clause, "is that the defendant retain primary control over the course to be followed." 424 U.S. 600, 607-08. Nothing in the record of this case, or the Kentucky Supreme Court's description of it, remotely suggests that the defendants had lost the ability to control the course to be followed by the court. Nowhere does the record suggest that the judge prevented the defendants from voicing opposition to a mistrial, or that there was insufficient time to do so before the release of the jury.

Rather than place the responsibility upon the defendant to press his right to proceed with the jury, the Kentucky court removed all control from the defendant by stating that "it simply does not make sense to require a criminal defendant to object to a mistrial." Such reasoning encourages defendants to stand silent in the face of improper action by a trial court, even though that action takes away their right to have their case heard by the first tribunal. See *United States v. Jorn*, 400 U.S. 470, 484 (1970) (explaining that a *sua sponte* mistrial deprives the defendant of his option to go to the first jury and perhaps end the dispute then and there with an acquittal); *Arizona v. Washington*, 434 U.S. at 497, 503-04 (1978) (having to stand trial a second time can increase the "financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted").

The Kentucky Supreme Court instead held that defendants should stand silent and await an ultimate

victory after having twice stood trial, been convicted, and had the case reversed on appeal. This Court has long discouraged such gamesmanship on the part of defendants. See, *e.g.*, *New York v. Hill*, 528 U.S. 110, 118 (2000) (a rule that defendants do not waive by silence their right to a trial within the time period required by the Interstate Agreement on Detainers "would enable defendants to escape justice by willingly accepting treatment inconsistent with the IAD's time limits, and then recanting later on. . . . In light of its potential for abuse and given the harsh remedy of dismissal with prejudice we decline to adopt it."); *Freytag v. Commissioner*, 501 U.S. 868, 895 (1991) (Scalia, J., concurring) (A party may not engage in "sandbagging" by "suggesting or permitting, for strategic reasons, that the trial court pursue a certain course, and later . . . claim[] that the course followed was reversible error."); *United States v. Tateo*, 377 U.S. 463, 468 fn.4 (1964) ("That any judicial system should encourage litigants to raise objections at the earliest rather than the latest possible time seems self-evident.").

The Kentucky Supreme Court's decision not only relieves defendants of the responsibility of pursuing their rights, but converts the Fifth Amendment protection, intended to shield defendants from successive prosecutions, into a sword which defendants may wield to purposely conceal their position concerning a mistrial. That court compounded its error by stating that "[i]t is the Commonwealth whose interests are harmed by an improper *sua sponte* mistrial." App. __a. This unprecedented approach to waiver and consent places the burden on the

government to object to any trial error that impairs a defendant's rights, because the error may lead to a reversal of a conviction, and a reversal is contrary to the government's interests. Such a "game theory" approach to trials runs contrary to our system of criminal justice, where each side is expected to object at trial to errors that impair their rights.

In the final analysis, the defendant is the only party who knows whether he desires the court's action or prefers to proceed with the initial tribunal. By requiring the Commonwealth to assert the defendant's rights and decide whether to object to a *sua sponte* mistrial, the Kentucky Supreme Court has removed the defendant from this process. That holding is contrary to this Court's precedent which places the defendant in control of his or her own case.

CONCLUSION

For the foregoing reasons, the Commonwealth of Kentucky prays this court to grant the petition for writ of *certiorari*.

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APPENDIX

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SUPREME COURT OF KENTUCKY
2006–SC–000677–MR
2006–SC–000680–MR

EDDIE CARDINE AND MICHAEL CURRY — APPELLANT

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
NOS. 04–CR001803–001 AND NO. 04–CR001803–002

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION OF THE COURT BY JUSTICE NOBLE

REVERSING

When Appellants Eddie Cardine and Michael Curry first went to trial, the trial court declared a mistrial soon after the jury was sworn. After a second joint jury trial, the Appellants were both found guilty of murder, attempted murder, and assault in the second degree, and were sentenced to thirty years' imprisonment. On appeal, both Appellants raise a number of issues, though only one need be addressed. Because the second jury trial in this case violated the Fifth Amendment's proscription against double jeopardy, Appellants' convictions are reversed.

I. Background

Appellants Cardine and Curry were both indicted on June 22, 2004 in a five-count indictment charging them with complicity to murder, two counts of complicity to attempted murder, complicity to assault in the first degree, and complicity to assault in the second degree.

After a previous confrontation between the Appellants and Deonte Neal, Tyson Gibbs, Otha Burney, and Dejuan Smith, the Appellants picked up a third person and met the other group for a second time. It was at this second meeting that a gunfight ensued, resulting in the death of Gibbs and injury of Neal and Burney, allegedly from shots fired by the Appellants.

As became apparent from the testimony at the second trial, it was undisputed that Cardine fired a gun. Curry, however, disputed having a gun, which would have been an issue at the first trial.

At the first jury trial, both parties made numerous pretrial motions before and after the jury was selected and sworn. The last matter brought to the court's attention by the Commonwealth was a newly discovered witness, a man who claimed Curry tried to sell a gun to him on the day of the shooting. Even though the Commonwealth conceded that it had other witnesses that would testify that Curry had a gun on the day of the shooting, it argued that this new witness was more disinterested than the others (despite the fact that he was discovered by the mother of one of the victims). Defense counsel objected that this witness's testimony was evidence of other bad acts under KRE

404(b) and should be excluded because the KRE 404(c) notice requirements were not met. As both sides made their arguments about this witness's admissibility to the judge, he was located, brought in the courtroom, and sworn to reappear. The witness then left the courtroom and the court took a break for lunch. After lunch, the parties argued over whether the new witness should be allowed to testify.

Each Appellant's defense counsel moved to exclude the new witness, or in the alternative, for a continuance. The Commonwealth claimed the witness was crucial. It should be noted that the Commonwealth's description of the testimony given by this "crucial witness" at the eventual second jury trial is limited to one sentence in its brief. The Commonwealth argued in favor of allowing the new witness to testify and stated that it preferred a continuance to exclusion.

The trial judge denied defense counsels' motions to exclude the witness. Immediately thereafter, the trial judge determined that the witness was an important factor in obtaining a fair trial and *sua sponte* declared a mistrial "pursuant to manifest necessity." Neither the defense nor the Commonwealth objected.

After the second jury trial in this case, Appellants were both convicted and sentenced to thirty years in prison. Their appeals to this Court, therefore, are a matter of right. Ky. Const. § 110(2)(b).

II. Analysis

A. Cardine and Double Jeopardy

Appellant Cardine's first claim of error is that the second trial violated his double jeopardy rights under

Section 13 of the Kentucky Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. For the reasons discussed herein, this Court agrees.

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb. . . ." U.S. Const. amend. V; see also Ky. Const. § 13 ("No person shall, for the same offense, be twice put in jeopardy. . . ."). The Fifth Amendment applies to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). Further, the Fifth Amendment and Section 13 of the Kentucky Constitution are "identical in the import of their prohibition against double jeopardy." *Jordan v. Commonwealth*, 703 S.W.2d 870, 872 (Ky.1985).

There is some confusion under Kentucky law about when jeopardy attaches. The current federal rule is clear: in jury trials, jeopardy attaches when the jury is impaneled and sworn. *Crist v Bretz*, 437 U.S. 28, 36, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977). Before the enactment of the Kentucky Penal Code, the rule for attachment of double jeopardy was the same as the current federal rule. *Baker v. Commonwealth*, 280 Ky. 165, 132 S.W.2d 766, 767 (1939) ("[J]eopardy attaches when the jury is impaneled and sworn."). However, in 1975, the General Assembly enacted KRS 505.030(4), which states that jeopardy attaches "after the first witness [i]s sworn. . . ."

According to the official commentary to the Penal

Code, the drafters intentionally changed the point at which jeopardy attaches to make it the same in both bench and jury trials. The official commentary to KRS 505.030(4) provides,

> The provision provided in subsection (4) is a codification of prior law, except for a slight change in the point at which jeopardy attaches. Previously, in a jury case, jeopardy attached when the jury was impaneled and sworn. The change that is made by subsection (4) serves only to create the same rule for jury and nonjury trials.

KRS 505.030(4) cmt. (citation omitted).

This Court heard a challenge to the constitutionality of KRS 505.030(4) soon after its enactment. *See Graham v. Commonwealth*, 562 S.W.2d 625, 626 (Ky.1978). In *Graham*, this Court noted that the U.S. Supreme Court had recently granted a writ of certiorari to the Ninth Circuit regarding its decision in *Bretz v. Crist*, 546 F.2d 1336 (9th Cir.1976), a case that expressly addressed the issue of when jeopardy attaches in a jury trial. The Ninth Circuit had recently ruled as a matter of constitutional law that jeopardy attached in a jury trial when the jury was sworn. *Id.* at 1343. Rather than waiting for the U.S. Supreme Court to rule on the issue, this Court issued its opinion in *Graham*, rejecting the approach employed by the Ninth Circuit and upholding the constitutionality of KRS 505.030(4). *Graham*, 562 S.W.2d at 627. This Court acknowledged that the new statute was subject to further challenge if the United States Supreme Court held that such a double jeopardy

attachment rule did not comport with the U.S. Constitution. *Id.* at 627 ("If the U.S. Supreme Court holds otherwise as a matter of federal constitutional law we will, of course, respectfully conform to its decision. . . .")

The U.S. Supreme Court issued its opinion in *Crist* four months later. The Court, in analyzing the Montana statute at issue, framed the issue as "whether the federal rule governing the time when jeopardy attaches in a jury trial is binding on Montana through the Fourteenth Amendment. The federal rule is that jeopardy attaches when the jury is empaneled and sworn; a Montana statute provides that jeopardy does not attach until the first witness is sworn." *Crist*, 437 U.S. at 29, 98 S.Ct. 2156.

As an initial matter, the U.S. Supreme Court noted:

> The reason for holding that jeopardy attaches when the jury is empaneled and sworn lies in the need to protect the interest of an accused in retaining a chosen jury. . . . It is an interest with roots deep in the historic development of trial by jury in the Anglo-American system of criminal justice. Throughout that history there ran a strong tradition that once banded together a jury should not be discharged until it had completed its solemn task of announcing a verdict.

Id. at 35-36, 98 S.Ct. 2156 (footnotes omitted). Applying this rationale to the statute at issue in *Crist*-a statute with a double jeopardy attachment provision identical to Kentucky's statute-the U.S. Supreme Court concluded that

> the federal rule as to when jeopardy attaches in a jury trial is not only a settled part of federal constitutional law. It is a rule that reflects and protects the defendant's interest in retaining a chosen jury. We cannot hold that this rule, so grounded, is only at the periphery of double jeopardy concerns. Those concerns-the finality of judgments, the minimization of harassing exposure to the harrowing experience of a criminal trial, and the valued right to continue with the chosen jury-have combined to produce the federal law that in a jury trial jeopardy attached when the jury is empaneled and sworn. . . . [Therefore,] the time when jeopardy attaches in a jury trial "serves as the lynchpin for all double jeopardy jurisprudence."

Id. at 37-38, 98 S.Ct. 2156 (quoting *Bretz*, 546 F.2d at 1343). Thus, under the Double Jeopardy Clause, as applied to the states through the Fourteenth Amendment, the U.S. Supreme Court explicitly held that "[t]he federal rule that jeopardy attaches when the jury is empaneled and sworn is an integral part of the constitutional guarantee against double jeopardy" and it is binding on the states. *Id.* at 38, 98 S.Ct. 2156. Thus, "Montana's view as to when jeopardy attaches is impermissible under the Fourteenth Amendment. . . ." *Id.* at 37, 98 S.Ct. 2156.

Therefore, statutes like Kentucky's that fix the point for attachment of jeopardy in jury trials as the swearing of the first witness are unconstitutional. KRS 505.030(4), enacted before the U.S. Supreme Court's

decision in *Crist*, is in direct conflict with its interpretation of the federal double jeopardy clause. Unfortunately, despite the promise in *Graham* that the issue could be raised again, Kentucky's statute fixing jeopardy attachment at the swearing of the first witness has remained untouched for over thirty years. *E.g.*, *Graham*, 562 S.W.2d at 627; *Allen v. Walter*, 534 S.W.2d 453, 455 (Ky.1976); *Radford v. Lovelace*, 212 S.W.3d 72, 79 (Ky.2006); *Commonwealth v. Lewis*, 548 S.W.2d 509, 510, n. 2 (Ky.1977). Even though several of our cases have cited *Crist* for the rule that jeopardy attaches in a jury trial when the jury is sworn, none have directly addressed its impact on KRS 505.030(4). E.g., *Couch v. Maricle*, 998 S.W.2d 469, 470 (Ky.1999); *Commonwealth v. Lamberson*, 201 S.W.3d 497, 499 (Ky.App.2006).

The direct conflict between the statute and the federal constitution is at issue in this case because the jury, but no witnesses, had been sworn in the first trial. Jeopardy had not attached under KRS 505.030(4), but it did attach under Crist. Therefore, this case requires us to definitively resolve this area of confusion in Kentucky law. Ultimately, the United States Supreme Court's interpretation of the federal constitution, as the supreme law of the land, trumps any competing interpretation by this Court and any inconsistent statute passed by this Commonwealth's General Assembly. Thus, to the extent that KRS 505.030(4) and the cases interpreting it guarantee anything less than the federal standard for attachment of double jeopardy, they are overruled.

In the present case, the jury was sworn and jeopardy therefore attached on October 25, 2005, the day before

the discovery of the new witness.

Attachment of jeopardy alone, however, does not resolve this case. While the protection afforded by the Double Jeopardy Clause is extraordinary, it is not without exception. "Once jeopardy attaches, prosecution of a defendant before a jury other than the original jury or contemporaneously-impaneled alternates is barred unless 1) there is a 'manifest necessity' for a mistrial or 2) the defendant either requests or consents to a mistrial." *Ray*, 982 S.W.2d at 673; *United States v. Dinitz*, 424 U.S. 600, 606-07, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976) ("Since Mr. Justice Story's 1824 opinion for the Court in *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580, 6 L.Ed. 165, this Court has held that the question whether under the Double Jeopardy Clause there can be a new trial after a mistrial has been declared without the defendant's request or consent depends on whether 'there is a manifest necessity for the (mistrial), or the ends of public justice would otherwise be defeated.' " (quoting *Illinois v. Somerville*, 410 U.S. 458, 461, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973))). As discussed below, in this case, there was no basis for the trial court's finding of a manifest necessity and the Appellants' attorneys neither requested nor consented to a mistrial.

Broadly speaking, "[w]hether to grant a mistrial is within the sound discretion of the trial court, and 'such a ruling will not be disturbed absent . . . an abuse of that discretion.' " *Bray v. Commonwealth*, 177 S.W.3d 741, 752 (Ky.2005) (quoting *Woodard v. Commonwealth*, 147 S.W.3d 63, 68 (Ky.2004)). However, "[a] mistrial is an extreme remedy and should be resorted to only when there appears in the record a

manifest necessity for such an action or an urgent or real necessity." *Id.* "[T]he trial judge, in making a mistrial decision, must use 'sound discretion' in declaring a mistrial because a constitutionally protected interest is inevitably affected." *Radford*, 212 S.W.3d at 79 (Ky.2006) (quoting *Grimes v. McAnulty*, 957 S.W.2d 223, 225 (Ky.1997)). And "[a]lthough a trial court is vested with discretion on granting a mistrial, the power to grant a mistrial ought to be used sparingly and only with the utmost caution, under urgent circumstances, and for very plain and obvious causes." *Commonwealth v. Scott*, 12 S.W.3d 682, 685 (Ky.2000) (citing *Glover v. McMackin*, 950 F.2d 1236, 1240 (6th Cir.1991)). Simply put, "[t]he error must be 'of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way [except by grant of a mistrial].'" *Bray*, 177 S.W.3d at 752 (quoting *Gould v. Charlton Co., Inc.*, 929 S.W.2d 734, 738 (Ky.1996)) (emphasis added).

"[W]hen a mistrial is declared at the behest of the prosecutor or on the court's own motion, . . . the valued right of a defendant to have his trial completed by the particular tribunal summoned to sit in judgment on him, [is balanced] against the public interest in insuring that justice is meted out to offenders." *Malinovsky v. Court of Common Pleas of Lorain County*, 7 F.3d 1263, 1270-71 (6th Cir.1993) (internal quotation marks and citations omitted). When the trial court *sua sponte* declares a mistrial, "the Double Jeopardy Clause is not offended and a retrial is not prohibited if there existed a manifest necessity for declaring a mistrial." Id. at 1270; *see also Arizona v. Washington*, 434 U.S. 497,

505-06, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978); *Glover*, 950 F.2d at 1242; *United States v. White*, 914 F.2d 747, 754 (6th Cir.1990); *Hamm v. Jabe*, 706 F.2d 765, 767 (6th Cir.1983); *United States v. Bridewell*, 664 F.2d 1050, 1051 (6th Cir.1981). Thus, if there was not a manifest necessity in this case, double jeopardy barred the second trial of Cardine.

A manifest necessity is an " 'urgent or real necessity'" that is "determined on a case by case basis." *Scott*, 12 S.W.3d at 684 (quoting *Miller v. Commonwealth*, 925 S.W.2d 449, 453 (Ky.1996)). A hung jury is a classic example of a manifest necessity requiring a mistrial. *Id.; see also Grimes v. McAnulty*, 957 S.W.2d 223, 224 (Ky.1997) (manifest necessity for a mistrial "found to exist when the defendant introduces improper evidence which prejudices the Commonwealth's right to a fair trial").

However, "[i]n some cases the declaration of a mistrial by a presiding judge when there was no manifest necessity to do so will prevent retrial.' " *Radford*, 212 S.W.3d at 79 (quoting *Nichols v. Commonwealth*, 657 S.W.2d 932, 933 (Ky.1983)); *see also Macklin v. Ryan*, 672 S.W.2d 60 (Ky.1984) (no manifest necessity for a mistrial where "juror who knew the mother of the co-defendant stated that she did not discuss the matter with the other jurors"); *Scott*, 12 S.W.3d at 683, 685 (no manifest necessity for mistrial where prosecutor almost handed loaded BB gun to juror, juror pointed out to prosecutor that he "know[s] enough about guns to check it and make sure it's empty before you start passing them around" and Commonwealth objected that the juror was hostile); *Leibson v. Taylor*, 721 S.W.2d 690, 693 (Ky.1986),

overruled on other grounds by *Shaffer v. Morgan*, 815 S.W.2d 402 (Ky.1991) (no manifest necessity for a mistrial where defendant improperly influenced brother's refusal to testify at his trial when brother has constitutional right to refuse to testify by asserting privilege against self-incrimination); *Miller v. Commonwealth*, 925 S.W.2d 449, 453 (Ky.1996), overruled on other grounds by *Garrett v. Commonwealth*, 48 S.W.3d 6 (Ky.2001) (no manifest necessity for a mistrial where child victim in sexual abuse and kidnapping case broke into tears on witness stand, had to leave courtroom, and those in courtroom could still hear her exclaiming "I don't want to. I don't want to." before returning to the stand). Therefore, when determining whether the trial court abused its discretion in declaring a mistrial, "it is necessary to examine whether there was manifest necessity to do so, since a mistrial-where no manifest necessity exists-triggers a person's constitutional protection against double jeopardy." *Radford*, 212 S.W.3d at 80. As in *Radford*, whether the trial court abused its discretion is the core issue in this case.

"When deciding whether there is manifest necessity to declare a mistrial, we must look to see if either parties' right to a fair trial has been infringed upon." *Id.* To do this, "the court must always assess if the parties' 'interest in seeing the first trial through to a verdict [is] outweighed by competing and equally legitimate demand for [protection of the parties' rights and] public justice.' " *Id.* (quoting *Scott*, 12 S.W.3d at 685). Specifically, "the decision should be based on whether the complained of 'event . . . prevented the [party] from receiving a fundamentally fair trial.' " *Id.*

(quoting *Scott*, 12 S.W.3d at 685).

In this case, on the morning of trial and after a jury had been selected and sworn, the Commonwealth disclosed to the court and opposing counsel that it had a newly discovered witness-a man who it knew only as "Rob" and to whom it had never spoken-who would testify that Curry tried to sell him a gun on the day of the shooting. However, in addition to Cardine pointing the finger at Curry, the Commonwealth already had two witnesses who planned to testify (and who did so at the second jury trial in this case) that they had made earlier statements to police that Curry shot at them.

The Commonwealth had nearly sixteen months to prepare its case after the court ordered discovery until the jury was sworn on October 25, 2005. When the Commonwealth showed up on October 25 and picked a jury, it was ready to present its case with the evidence it had. By proceeding and completing jury selection, the Commonwealth tacitly acknowledged that it had enough evidence to proceed to trial. Therefore, the witness, whom neither side knew about before the jury was sworn, could not have been essential and had to be cumulative. Otherwise, the Commonwealth would have asked for a continuance before the jury was selected and sworn. Cardine's appellate counsel correctly argues that the Commonwealth's need to put on this newly discovered witness paled in comparison to a defendant's "valued right to have his trial completed by a particular tribunal," which is the "right that lies at the foundation of the federal rule that jeopardy attaches when the jury is empaneled and sworn." *Crist*, 437 U.S. at 36, 98 S.Ct. 2156 (internal quotation marks omitted).

Thus, the Commonwealth's argument against double jeopardy is based on a claim that this witness was essential. Defense counsel, however, argued that the witness was merely an attempt to get in testimony about prior bad acts under KRE 404(b) without complying with KRE 404(c)'s notice requirements.[1] Under KRE 404(c) if the Commonwealth fails to provide the required notice, the trial judge has only the option to exclude the evidence or grant a continuance. Assuming 404(b) applies, the trial court's decision to grant a mistrial on its own motion was not a manifest necessity, because both exclusion and a continuance were possible alternative remedies. Even if it does not, those remedies are far less invasive to the Appellant's double jeopardy rights than granting a mistrial, and the trial court was mandated to use these remedies unless there was a manifest necessity to declare a mistrial.

> [1] KRE 404(c) requires "reasonable pretrial notice to the defendant of [the prosecution's] intention to offer such evidence." If the prosecution fails to provide the required notice, the court may either exclude the evidence or "for good cause shown may excuse the failure to give such notice and grant the defendant a continuance or such other remedy as is necessary to avoid unfair prejudice caused by such failure."

Also, Appellant argued as grounds for exclusion or a continuance that Criminal Rules 7.24 and 7.26 were violated by the late disclosure of this witness. Despite Appellant's claim, however, these rules do not require

disclosure of prosecutorial witnesses.[2] Actually, the fact that these rules were not violated cuts against the need for a mistrial since no remedy, much less one as extreme as a mistrial, was required under these Criminal Rules absent a discovery violation.

> [2] In addition, neither the local rules of the Jefferson Circuit Court nor the trial judge's discovery order required disclosure.

Even if this newly discovered witness was material, there would still not be a basis for a mistrial based on manifest necessity. In *Downum v. United States*, 372 U.S. 734, 735-38, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963), a sworn jury was discharged after the prosecutor failed to assure the presence of a witness that was "essential" for two of the six counts against the defendant. The U.S. Supreme Court found that the witness would have only strengthened the case against the defendant and it held there was not a manifest necessity for a mistrial; thus a retrial was prohibited. *Id.* at 737-38, 83 S.Ct. 1033; *see also* 8 Leslie W. Abramson, *Kentucky Practice: Criminal Practice and Procedure* § 14:10 (4th ed.2003) (retrial prohibited where "mistrial allows prosecutor to strengthen case against defendant"). This case is on all fours with the present case, applies federal double jeopardy rules, and is binding on this Court.

In *Mizell v. Attorney General of State of New York*, 586 F.2d 942 (2d Cir.1978), two witnesses for the prosecution did not show up for the beginning of a trial, even though it was likely at least one of them would be able to make it by the following Monday. On Thursday, the prosecutor asked for a continuance until the

following Monday, but the trial judge discharged the jury instead. The Second Circuit Court of Appeals held that "[u]nder these circumstances neither the 'ends of public justice' nor 'manifest necessity' required a mistrial. A continuance should have been granted." *Id.* at 947. In much the same way that the trial court in this case considered its crowded calendar, in *Mizell*, "[t]he only reason given by the court for the failure to grant a continuance was the convenience of the jury." *Id.* The court's reasoning that another case was scheduled to begin the next day, while a very real problem for the trial court, cannot supersede this Appellant's double jeopardy rights, and does not create a manifest necessity for a mistrial.

As in *Radford*, the Commonwealth in this case did not make a motion for a mistrial but the trial court nonetheless declared one on its own motion after jeopardy had attached. *Radford*, 212 S.W.3d at 83. The facts of *Radford* dealt with uncoercive contact between the defendant's relative and witnesses in the case, and this Court held that double jeopardy barred a retrial because such uncoercive contact did not rise to the level of manifest necessity required for a mistrial. *Id.*

Similar to *Radford*, a trial court's *sua sponte* declaration of a mistrial pursuant to manifest necessity is unnecessary when the Commonwealth offers late-discovered cumulative evidence. In this case, the relative weight of the Commonwealth's late-discovered witness merited only his exclusion or a continuance.

Instead of granting a continuance, the trial court informed the parties that it had another upcoming lengthy criminal trial and that its next available trial date was months down the road. However, this alone

should have given the court pause about declaring a mistrial, because the delay in getting another date only underscores the Appellant's right to be tried by the jury he had. It was within the trial court's discretion to exclude this witness without undue prejudice to the Commonwealth if it did not want to grant a continuance. Having these viable options precludes a finding of manifest necessity, and it was thus an abuse of discretion to grant the mistrial.

B. Curry

Curry has not raised the double jeopardy issue in his brief, even though he was tried with Cardine and his counsel lodged the same objections to the new witness at trial. Therefore, any double jeopardy error in his conviction must be addressed under the palpable error rule, which states that "[a] palpable error which affects the substantial rights of a party may be considered . . . by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error." RCr 10.26 (emphasis added). As this Court has repeatedly held, double jeopardy claims fall under the palpable error rule because this Court "do[es] not want to let stand a conviction possibly tainted by double jeopardy." *Terry v. Commonwealth*, 253 S.W.3d 466, 470 (Ky.2007); *see also Brooks v. Commonwealth*, 217 S.W.3d 219, 222 (Ky.2007). This is basic palpable error review, where an unpreserved error requires reversal "if a manifest injustice has resulted from the error," which means there "is [a] probability of a different

result or [the] error [is] so fundamental as to threaten a defendant's entitlement to due process of law." *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky.2006). Clearly, allowing this case to proceed to trial a second time caused a completely different outcome: conviction instead of release. Thus, the double jeopardy analysis above applies equally to Appellant Curry, making his conviction equally in violation of his constitutional rights.

C. Waiver and Preservation of Error

In response to Cardine's brief, the Commonwealth argues that the double jeopardy violation was somehow waived or otherwise not preserved for appeal because the Appellants got what they requested (albeit in the form of a mistrial), did not object to the mistrial, and did not raise the issue when the trial court was setting a date for the second trial. Because these arguments are also applicable to Curry, they are addressed as to both Appellants.

First, neither Appellant asked for a mistrial.[3] Appellants requested the alternative relief described above: exclusion of the new witness or continuance to another date. A mistrial is not a substitute for a continuance, which the Commonwealth seems to imply, because it excuses the current jury from the case, whereas a continuance postpones the trial but keeps the same jury. Thus, for double jeopardy purposes, only the latter remedy is workable, since only it preserves the "valued right to have [a] trial completed by a particular tribunal," which is the "right that lies at the foundation of the federal rule that jeopardy attaches

when the jury is empaneled and sworn." *Crist*, 437 U.S. at 36, 98 S.Ct. 2156 (internal quotation marks omitted).

> [3] If Appellants had asked for a mistrial, they could have waived their Double Jeopardy claim. *Oregon v. Kennedy*, 456 U.S. 667, 673, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982) ("[I]n the case of a mistrial declared at the behest of the defendant, quite different principles come into play. Here the defendant himself has elected to terminate the proceedings against him, and the 'manifest necessity' standard has no place in the application of the Double Jeopardy Clause."). *See also Derry v. Commonwealth*, 274 S.W.3d 439 (Ky.2008).

Second, the defense does not have to object to a mistrial. In *Radford*, retrial of the defendant was barred on double jeopardy grounds even though the defendant did not object to the trial court's declaration of a mistrial. *Radford*, 212 S.W.3d at 83; *see also United States v. Gantley*, 172 F.3d 422, 429 (6th Cir.1999) ("[A] defendant's failure to object to a mistrial implies consent thereto only if the sum of the surrounding circumstances positively indicates this silence was tantamount to consent." (emphasis added)). In *Radford*, this Court noted that "[a]ccording to the record, the first mention by the trial court of a mistrial was from the bench when the trial court dismissed the jury. Therefore, there is no argument that the Appellant consented to the mistrial because the record does not provide any evidence that a mistrial was even discussed, or moved for by the Commonwealth, before

the trial court dismissed the jury." *Radford*, 212 S.W.3d at 76-77. This Court also noted,

> Furthermore, RCr 9.22 states that if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice that party. This rule is almost identical to Federal Rule of Criminal Procedure 51(b), which provides, in part, that if a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. Therefore, when "the very first time there was mention of [a mistrial was] when the court [declared a mistrial,] [i]t was clear . . . that the time for argument was over [and the Appellant] simply could not [have] waive[d] [his] opportunity to object when [he] was never given such an opportunity."

Id. at 77 (quoting *United States v. Breeding*, 109 F.3d 308, 310 (6th Cir.1997)) (alterations in original). Since the Appellants in this case also failed to object to the trial court's abrupt *sua sponte* declaration of a mistrial, *Radford* controls. Therefore, as in *Radford*, the Appellants in this case did not consent to the trial court's declaration of a mistrial, nor were they required to object.

Additionally, it simply does not make sense to require a criminal defendant to object to a mistrial. If the trial judge improperly grants a mistrial, as in this case, such a rule would require the defense attorney to risk forgoing a win for his client if the objection was

sustained. Forcing the defense to risk snatching defeat from certain victory is impermissible in light of the adversarial nature of our justice system and the ethical requirements of zealous, competent advocacy. This notion is buttressed by the fact that the burden of proof is on the Commonwealth. KRS 500.070(1); *Brock v. Commonwealth*, 947 S.W.2d 24, 26 (Ky.1997). It is the Commonwealth whose interests are harmed by an improper, *sua sponte* mistrial. When the trial court ordered, *sua sponte*, a mistrial after the jury was sworn under an erroneous finding of manifest necessity, the Commonwealth could have objected to provide the court with a chance to correct its error and to allow the Commonwealth a chance to later prove its case. No such objection was made by the Commonwealth.

Third, even though neither Appellant raised the issue of double jeopardy at the time of their retrial, as noted above double jeopardy violations can be addressed as palpable error because the nature of such errors is to create manifest injustice. Presentation of such errors to the trial court, while perhaps preferable, is not required. In *Sherley v. Commonwealth*, 558 S.W.2d 615, 618 (Ky.1977), overruled on other grounds by *Dixon v. Commonwealth*, 263 S.W.3d 583 (Ky.2008), this Court heard a double jeopardy claim even though it was not raised at trial. Even though the defendant "did not present th[e] issue of double jeopardy or multiple prosecution to the trial court . . . [this Court was] persuaded that failure to preserve this issue for appellate review should not result in permitting a double jeopardy conviction to stand." *Id.* This principle has been repeatedly affirmed: "[U]nder our longstanding rule, double jeopardy questions may be

reviewed on appeal, even if they were not presented to the trial court." *Terry*, 253 S.W.3d at 470; *Beaty v. Commonwealth*, 125 S.W.3d 196, 210 (Ky.2003); *Grundy v. Commonwealth*, 25 S.W.3d 76, 85 (Ky.2000); *Butts v. Commonwealth*, 953 S.W.2d 943, 945 (Ky.1997); *Gunter v. Commonwealth*, 576 S.W.2d 518, 522 (Ky.1978); *see also Menna v. New York*, 423 U.S. 61, 62, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975) (double jeopardy claim on appeal not waived by defendant's guilty plea). This Court "remain[s] committed . . . to our procedural holding in *Sherley* that failure to preserve double jeopardy issues 'should not result in permitting a double jeopardy conviction to stand.'" *Dixon*, 263 S.W.3d at 593 n. 50, (quoting *Sherley*, 558 S.W.2d at 618).

Ultimately, because the Appellants did not request or cause the mistrial, their double jeopardy rights remained intact. They requested appropriate relief when they sought exclusion or a continuance. The fact that the trial court *sua sponte* and unnecessarily declared a mistrial cannot prejudice or extinguish their double jeopardy rights. Thus, the Appellants adequately preserved the issue by their alternative motions for exclusion or a continuance, and they were not required to object to the declaration of a mistrial.

III. Conclusion

In conclusion, jeopardy attached before the trial court abused its discretion in finding a manifest necessity and *sua sponte* declaring a mistrial at the first jury trial of Cardine and Curry. Therefore, their second jury trial violated Section 13 of the Kentucky

Constitution and the Double Jeopardy Clause of the Fifth Amendment, as applied to the states by the Fourteenth Amendment. For that reason, their convictions and the judgments of the Jefferson Circuit Court are reversed, and these actions shall be dismissed.

MINTON, C.J.; SCHRODER and VENTERS, JJ., join. CUNNINGHAM, J., dissents by separate opinion with SCOTT, J., joining. ABRAMSON, J., not sitting.

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SUPREME COURT OF KENTUCKY
2006–SC–000677–MR
2006–SC–000680–MR

EDDIE CARDINE AND MICHAEL CURRY — APPELLANTS

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
NOS. 04–CR001803–001 AND NO. 04–CR001803–002

COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING OPINION BY JUSTICE CUNNINGHAM

I respectfully dissent from the well-written opinion of Justice Noble.

By the entering of the mistrial, Appellants received the continuance each requested. The trial court was faced with the option of not allowing the Commonwealth to call a last minute witness or the option of granting a continuance. The Commonwealth insisted that the newly discovered witness was critical because he was a disinterested third party and the only person, other than the victims of the shooting, who could put a gun in the hands of Curry. The Commonwealth argued that the witness was crucial and the ends of justice required that he be allowed to testify. According to the brief of Appellant, Cardine, even the trial court thought the witness was important to both the defense

and the prosecution. Both defense counsels argued for exclusion, or in the alternative, a continuance. The trial court instructed the attorneys to talk to the witness to see if the matter could be resolved. The matter could not be resolved, and the court was faced with having to either exclude the critical evidence or continue the trial. The court was then advised by at least one defense counsel that a twenty-four hour continuance would not be sufficient.

In addition to jeopardizing other cases that were on the docket, as well as having a sworn jury out on recess for several days, the court decided that a mistrial was the best solution. Other judges may have handled the situation differently. But under the difficult circumstances, this trial judge did what she thought protected the interests of both parties. Her actions were reasonable, and the trial court did not abuse its discretion in finding manifest necessity and declaring a mistrial. The ancient protection against twice being placed in jeopardy of a criminal prosecution is intended to protect the abuse of individuals from arbitrary power of the state. It was never intended to be a gratuity to criminal defendants when the judiciary, in good faith, blunders.

SCOTT, J., joins this dissenting opinion.

SUPREME COURT OF KENTUCKY
2006–SC–000677–MR

EDDIE CARDINE APPELLANT

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
NO. 04–CR001803–001

COMMONWEALTH OF KENTUCKY APPELLEE

AND

2006–SC–000680–MR

MICHAEL CURRY APPELLANT

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
NO. 04–CR001803–002

COMMONWEALTH OF KENTUCKY APPELLEE

ORDER DENYING PETITION FOR REHEARING

The Petition for Rehearing filed by the Appellee, of the Memorandum Opinion, rendered January 22, 2009, is DENIED.

Minton, C.J.; Cunningham, Noble, Schroeder,

Scott and Venters,J.J., concur. Abramson, J., not sitting.

ENTERED: June 25, 2009.

/S/ JOHN D. MINTON
CHIEF JUSTICE

No. 09-419

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2009

COMMONWEALTH OF KENTUCKY,
Petitioner

vs.

EDDIE CARDINE AND MICHAEL CURRY
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

RESPONDENT MICHAEL CURRY'S BRIEF IN OPPOSITION

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January 7, 2010

QUESTION PRESENTED

Respondent Michael Curry believes the question presented by petitioner's Petition for a Writ of Certiorari is essentially one of state law Whether the Double Jeopardy Clause of the United States Constitution prohibits a State appellate court from Adopting a State Procedural Policy Dispensing with Its Contemporaneous Objection Rule for Claims of Double Jeopardy Raised for the First Time in a State Appeal from a Conviction in a State Trial Court?

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STATEMENT OF THE BASIS FOR JURISDICTION

Petitioner claims to be basing this Court's jurisdiction upon 28 U S C §1257(a) This Court does not have jurisdiction under that statute because petitioner's petition does not state a violation of "any title, right, privilege, or immunity under the Constitution of the United States"

STATEMENT OF THE CASE

A. **Preliminary Statement:**

In its "Question Presented," the Commonwealth of Kentucky concedes that there was no manifest necessity for aborting the original trial of Michael Curry and Eddie Cardine Part of the proposition, as stated by the Commonwealth in its question, is that "the trial court *sua sponte* declares a mistrial absent manifest necessity" In other words, the State does not contest the validity of the Supreme Court of Kentucky's holding that the second trial violated double jeopardy protections It contests the authority of the court to address the merits of the issue

The decision of the Supreme Court of Kentucky to address this issue rests, at least in part, on an adequate and independent state law ground For over 30 years the Supreme Court of Kentucky has adhered to a state procedural policy that it will address double jeopardy issues raised on appeal even if they are not raised or are improperly raised in the court below Sherley v Commonwealth, 558 S W 2d 615, 618 (Ky 1977), *overruled on other grounds by* Dixon v Commonwealth, 263

S W 3d 583 (Ky 2008) This waiver of the State's contemporaneous objection rule, KY R CRIM P 9 22, applies to all double jeopardy issues, not just unsolicited declarations of a mistrial *See* Beaty v Commonwealth, 125 S W 3d 196, 210 (Ky 2003) (convictions for both manufacturing a controlled substance and possession of controlled substance manufactured violate double jeopardy), Butts v Commonwealth, 953 S W 2d 943, 945 (Ky 1997) (Whether convictions under two different statutes for same course of conduct violates double jeopardy)

Essentially, the State is asking this Court to declare this long-standing state procedural policy unconstitutional under the Double Jeopardy Clause of the United States Constitution

B. The Trial Court Proceedings:

The disagreements Respondent Curry has with petitioner's Statement of the Case are mostly minor Petitioner claims that defense counsel interviewed Hebert, while the record shows that counsel for all parties participated in the interview of Hebert Petitioner claims that Hebert was sworn to reappear after the interview, while the record shows that Hebert was sworn to reappear prior to the interview

Petitioner fails to adequately express that Michael Curry and Eddie Cardine made it clear to the trial judge the relief they wanted was the exclusion of Hebert's testimony When he first learned of Hebert's testimony Michael Curry's attorney told the court, "I would ask that [Hebert's testimony] would be excluded, and not

be allowed to, discussed at openings [statements]" (VR 05-1, 10/26/05, 10 49 24) A short time later he said, "I'm not asking for a continuance, I'm asking for exclusion" (VR 05-1, 10/26/05, 10 55 57) Following lunch, and after discussions between the court and parties that were not on the record, Curry's defense counsel said, "I'm going to move to exclude him [Hebert], I don't think you're going to do that" (VR 05-1, 10/26/05, 13 22 55) This was not a case where the defendants were tacitly seeking a mistrial They wanted Hebert's testimony excluded from the trial that had already been begun

Respondent Curry also disagrees with what he considers the false impression given concerning the amount of time that elapsed between the trial court's *sua sponte* declaration of a mistrial and when the proceedings ended In fact, barely three minutes elapsed between the time of the mistrial declaration and when the video recording of the proceedings ended (VR 05-1, 10/26/05, 14 46 10-14 49 40)

C. **Direct Appeal to the Supreme Court of Kentucky:**

Respondent Michael Curry did not raise the double jeopardy issue in his appeal to the Supreme Court of Kentucky Respondent Cardine did raise that issue in his brief to the Supreme Court of Kentucky When Cardine raised the issue, Petitioner Commonwealth of Kentucky did not argue that Cardine's failure to object after the trial court's *sua sponte* declaration of a mistrial barred the Supreme

Court of Kentucky from addressing the merits of Cardine's double jeopardy claim Instead, the Commonwealth argued a) that the trial court's *sua sponte* declaration of a mistrial was not an abuse of discretion, b) the claim was unpreserved for appeal, and c) the claim was waived by Cardine's request for a continuance before the trial court declared a mistrial

The Commonwealth's argument to the Supreme Court of Kentucky, which is brief, is reproduced here in its entirety

> THE JEFFERSON CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN FINDING A MANIFEST NECESSITY AND DECLARING A MISTRIAL WHEN APPELLANT REQUESTED A CONTINUANCE TO A NEW TRIAL DATE IN LIEU OF A SHORT CONTINUANCE OF THE PENDING TRIAL
>
> Appellant's first argument is that it was a violation of the proscriptions against double jeopardy when he was retried after his first trial was declared a mistrial In his argument appellant fails to note that the trial court declared the mistrial after appellant argued that he would be prejudiced by the disclosure of a new witness immediately prior to the commencement of proof, that a short continuance would not cure the prejudice and only exclusion or in the alternative continuance to a new trial date would be proper (See Tape 2 10/26/05 14 40 15--14 41 30) The court then only granted appellant what he asked for and it was ***not an abuse of discretion*** to find a manifest necessity and declare a mistrial when the court did not have a certain date for the new trial ***The claim is otherwise unpreserved and waived by the request for a new trial date.***

Double jeopardy furthermore does not bar retrial if the proceedings were terminated because the trial court found a manifest necessity Commonwealth v Scott, 12 S W 3d 682 (Ky 2000) The declaration of a mistrial is vested to the sound discretion of the trial court See Neal v Commonwealth, 95 S W 3d 843 (Ky 2003) And the limit upon the exercise of that discretion must take into consideration that the trial court is best situated to evaluate the issue at hand Wiley v Commonwealth, 575 S W 2d 166 (Ky 1978)

Herein the trial court carefully considered the importance of the new witness to both the prosecution and defense Appellant sought exclusion or a new trial date The Commonwealth indicated a need for the evidence coming from an unbiased third party but did not object to a continuance

There though was no reason to exclude the witness from testifying as there was no discovery violation and the fact that Curry possessed a firearm earlier in the day is not a prior bad act under KRE 404 But regardless notice was given immediately to opposing counsel and accordingly even if there was not disclosure under the rule the court was allowed to fashion an appropriate remedy KRE 404(c)

The new trial date was an otherwise appropriate remedy (as it was requested by the appellant) and there was no objection to the declaration of a mistrial by either Cardine or Curry Curry, in fact, does not even raise the claim of error and notes only the declaration was a necessity due to the impact the prosecution's late discovery of the witness had on the defendants's (sic) defenses (See Brief for Appellant in 2006-SC-680 at p 5)

Certainly there was grounds for finding a manifest necessity as the court with the first possible trial date being over two months away and no trial date certain did

> not have any reason to know when it could retry the case with the present jury if at all And as discussions with counsel after the declaration indicated their (sic) was good reason for uncertainty as both the court and counsel had significant cases already on there (sic) calendar through two-four months later Reversal now is otherwise unwarranted

Brief for Commonwealth, 2006-SC-677, 6-8 (2008 WL 6013722 at 5) (emphasis added)

As can be seen from the above quote, petitioner did not argue that the Supreme Court of Kentucky was barred from deciding the Double Jeopardy issue raised by Cardine Petitioner did not argue that Cardine's failure to object to the trial court's *sua sponte* declaration of a mistrial after it occurred constituted an implied consent to the mistrial The primary position of the Commonwealth was that it was not an abuse of the trial court's discretion to find that a manifest necessity existed for the declaration of a mistrial The fallback positions of the Commonwealth were that the issue was not preserved for appeal and that it was waived by Cardine's request for a continuance [1]

The Supreme Court of Kentucky disagreed with the Commonwealth's analysis That Court found there was no manifest necessity for declaration of the mistrial, a finding the Commonwealth of Kentucky does not challenge in its Petition for a Writ of Certiorari In fact, the Commonwealth specifically concedes

there was no manifest necessity for the mistrial in the "Question Presented" section of its Petition for a Writ of Certiorari Therefore, the Supreme Court of Kentucky's holding regarding the existence of a manifest necessity for the mistrial will not be discussed in detail

The Supreme Court of Kentucky also addressed petitioner's claims that the issue was not preserved for appeal and that it was waived by the request for a continuance in Section C of its opinion The Court gave three independent reasons for denying this portion of petitioner's argument on appeal First, the Kentucky Supreme Court found that the issue was not waived because neither Cardine nor Curry asked the trial court for a mistrial The court found, and its finding is supported by the record, that respondents asked for either exclusion of the new witness or a continuance Second, citing Radford v Lovelace, 212 S W 3d 72 (Ky 2006) and United States v Gantley, 172 F 3d 422 (6th Cir 1999), the court held that Cardine and Curry were not required to object to the mistrial Third, the Kentucky Supreme Court held that a double jeopardy violation is a palpable error that can be addressed under the State's plain error, or "substantial error," rule KY R CRIM P 10 26

D. The Commonwealth's Petition for Rehearing:

[1] The Commonwealth's brief uses the term "request for a new trial date," but the Supreme Court of Kentucky found this to be a request for a continuance under Kentucky procedural law and that finding is supported by the quotations attributed to trial defense counsel in petitioner's Petition for a Writ of Certiorari

The Commonwealth raised two issues in its Petition for Rehearing First, the Commonwealth argued the Supreme Court of Kentucky had overlooked material facts in deciding there was no manifest necessity for the declaration of a mistrial As stated before, the Commonwealth does not challenge the Supreme Court of Kentucky's finding there was no manifest necessity for a mistrial in this petition for a writ of certiorari The second argument made by the Commonwealth in its petition for rehearing was that the Supreme Court of Kentucky had incorrectly extended its opinion in Radford v Lovelace, 212 S W 3d 72 (Ky 2006), which held that a contemporaneous objection is not required when there is no opportunity to object, to a situation where the Commonwealth felt there was an opportunity for an objection, albeit after the trial court had issued its ruling declaring a mistrial The Commonwealth did not challenge in its Petition for Rehearing the procedural policy of the Supreme Court of Kentucky of addressing double jeopardy issues on appeal even though not raised or improperly raised in the court below because it considers those types of errors to meet its definition of a "palpable error "

The Supreme Court of Kentucky did not issue a separate opinion to address the reasons it denied the Commonwealth's petition for rehearing However, KY R CIV P 76 32(1)(b) provides, "Except in extraordinary cases when justice demands it, a petition for rehearing shall be limited to a consideration of the issues argued

on the appeal " To the extent the Commonwealth's argument in its petition for rehearing could be construed as presenting the same argument it makes in its Petition for a Writ of Certiorari, the Supreme Court of Kentucky was entitled to disregard the issue because it was made for the first time in the Petition for Rehearing

REASONS FOR DENYING THE WRIT

I.

THE QUESTION PRESENTED IN THE PETITION FOR A WRIT OF CERTIORARI WAS NOT PROPERLY PRESENTED TO THE SUPREME COURT OF KENTUCKY.

In its petition for a writ of certiorari the Commonwealth of Kentucky claims, "The Commonwealth responded[2] that the defendant had consented to the court's *sua sponte* order by his actions both before ***and after*** the judge announced her intent to declare a mistrial " Petition for a Writ of Certiorari at 4 (emphasis added) That claim is not accurate Respondent, in his statement of the case, quoted the Commonwealth's argument from its brief in Cardine's case in full The only mention of the discussions held after the trial court declared a mistrial in the Commonwealth's argument was a reference to the fact that the next available trial date was some time away ("And as discussions with counsel after the declaration

[2] The Commonwealth claims its response was to Cardine's argument that the second trial had violated his double jeopardy rights under the Fifth and Fourteenth Amendments to the United States Constitution

indicated their (sic) was good reason for uncertainty as both the court and counsel had significant cases already on there (sic) calendar through two-four months later ") That mention was intended to show that there was a manifest necessity for the declaration of the mistrial, not the argument the Commonwealth now claims it supports In the brief it filed before the Supreme Court of Kentucky the Commonwealth never claimed that Cardine's failure to object to the mistrial *after* it was declared constituted a waiver or consent to the declaration of the mistrial The Commonwealth's claim of waiver was based on Curry's and Cardine's requests for a continuance before the mistrial was declared The Supreme Court of Kentucky made a finding of fact that those requests were not the same as a motion for a mistrial The Commonwealth has not contested that finding Instead it has shifted its argument to something that was not properly presented to the Supreme Court of Kentucky

Likewise, the Commonwealth now claims, "The Commonwealth had argued that the defendants' failure to object, both before and after the lower court announced its intention to declare a mistrial, was proof of the defendants' consent thereto " Petition for a Writ of Certiorari at 5 The claim is not accurate That argument was made, at best, in the Petition for Rehearing Under Kentucky procedural law, an argument made for the first time in a petition for rehearing is not timely Herrick v Wills, 333 S W 2d 275, 276 (Ky 1960) ("Errors not called

to the attention of the appellate court prior to the time a decision is rendered may be deemed waived Except for most extraordinary cause, we will not consider an issue on appeal raised for the first time in a petition for rehearing For the foregoing reason, the petition for rehearing is overruled "), Reed v Reed, 457 S W 2d 4, 7 n 1 (Ky 1969), KY R CIV P 76 32(1)(b)

The Commonwealth now makes the failure to object to a mistrial in the interval between the declaration of the mistrial and the actual dismissal of the jury the focus of its allegation of implied waiver It says, "At issue in this case is whether a defendant consents to a mistrial by failing to object ***after*** the trial court *sua sponte* declares one " Petition for a Writ of Certiorari at 7 (emphasis added) The Commonwealth argues, "Certainly there was ample time for the defense to express its position on mistrial The parties were in the courtroom for several minutes ***after*** the court declared the mistrial " Petition for a Writ of Certiorari at 13 (emphasis added) The issue the Commonwealth is asking this Court to grant certiorari upon was never presented by the Commonwealth in the appellate briefs it filed with the Supreme Court of Kentucky

The Supreme Court does not normally decide questions that are neither raised nor resolved below Glover v United States, 531 U S 198, 205 (2001) This Court's customary practice is to "deal with the case as it came here and affirm or reverse based on the ground relied upon below " Peralta v Heights Med

Center, Inc., 485 U.S. 80, 86 (1988). *See* Campbell v. Louisiana, 523 U.S. 392, 403 (1998) ("'With "very rare exceptions," we will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.'" (quoting Adams v. Robertson, 520 U.S. 83, 86 (1997) (per curiam)). In Adams, this Court said, "[T]he aggrieved party bears the burden of demonstrating that the state court had 'a fair opportunity to address the federal question that is sought to be presented here.'" Id., 520 U.S. at 87.

This Court should not grant certiorari to decide an issue that was never fairly presented to the Supreme Court of Kentucky for decision in the first instance.

II.

THE SUPREME COURT OF KENTUCKY'S OPINION IS BASED UPON AN ADEQUATE AND INDEPENDENT STATE LAW GROUND.

The Supreme Court of Kentucky gave three reasons for denying the Commonwealth's "otherwise unpreserved and waived" argument from its appellate brief. The third reason is a completely independent and adequate state law reason for denying the Commonwealth's argument. Respondent will quote that entire section, it is not overly long, so this Court can see it is an independent state law ground for denying the Commonwealth's argument.

> Third, even though neither Appellant raised the issue of double jeopardy at the time of their retrial, as noted

> above double jeopardy violations can be addressed as palpable error[3] because the nature of such errors is to create manifest injustice Presentation of such errors to the trial court, while perhaps preferable, is not required In Sherley v Commonwealth, 558 S W 2d 615, 618 (Ky 1977), *overruled on other grounds by* Dixon v Commonwealth, 263 S W 3d 583 (Ky 2008), this Court heard a double jeopardy claim even though it was not raised at trial Even though the defendant "did not present th[e] issue of double jeopardy or multiple prosecution to the trial court [this Court was] persuaded that failure to preserve this issue for appellate review should not result in permitting a double jeopardy conviction to stand" Id This principle has been repeatedly affirmed "[U]nder ***our longstanding rule***, double jeopardy questions may be reviewed on appeal, even if they were not presented to the trial court" Terry [v. Commonwealth], 253 S W 3d [466 (Ky 2007)] at 470, Beaty v Commonwealth, 125 S W 3d 196, 210 (Ky 2003), Grundy v Commonwealth, 25 S W 3d 76, 85 (Ky 2000), Butts v Commonwealth, 953 S W 2d 943, 945 (Ky 1997), Gunter v Commonwealth, 576 S W 2d 518, 522 (Ky 1978), *see also* Menna v New York, 423 U S 61, 62, 96 S Ct 241, 46 L Ed 2d 195 (1975) (double jeopardy claim on appeal not waived by defendant's guilty plea) This Court "remain[s] committed to ***our procedural holding*** in Sherley that failure to preserve double jeopardy issues 'should not result in permitting a double jeopardy conviction to stand' " Dixon, 263 S W 3d at 593 n 50, (quoting Sherley, 558 S W 2d at 618)

Cardine v Commonwealth, 283 S W 3d 641, 652-653 (Ky 2009) (emphasis added) This basis for denying the Commonwealth's argument was strictly a state

[3] Kentucky's palpable or plain error rule, KY R CRIM P 10 26, states, "A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error"

issue The Supreme Court of Kentucky refers to "our longstanding rule" and "our procedural holding " It refers to "palpable error " The cases it cites are all state cases from Kentucky, with one exception, Menna v New York When citing Menna, the Kentucky Supreme Court used the "see also" signal, indicating it was cited as an additional source material that supported the proposition

The Kentucky courts realize this is a state court rule It reflects the value the Kentucky courts place on the individual's right to be free from the governmental overreaching that the Double Jeopardy Clause was intended to protect against The Kentucky Supreme Court plainly adopted this as an independent state rule in Baker v Commonwealth, 922 S W 2d 371 (Ky 1996) (*overruled on other grounds by* Dixon v Commonwealth, supra), where it said

> At the outset we must observe that appellant's double jeopardy claim is unpreserved Appellant made no double jeopardy objection whatsoever nor did she tender instructions She did object to the instructions which were given on grounds that they contained overlapping mental states Nevertheless, we have held in Sherley v Commonwealth, Ky , 558 S W 2d 615, 618 (1977), and Gunter v Commonwealth, Ky , 576 S W 2d 518, 522 (1978), that failure to object on grounds of double jeopardy does not constitute a waiver of the right to raise the issue for the first time on appeal This view appears to be based on Menna v New York, 423 U S 61, 96 S Ct 241, 46 L Ed 2d 195 (1975), a per curiam opinion which held that a plea of guilty after an unsuccessful plea of double jeopardy would not constitute waiver, that the merits of the double jeopardy claim should be reviewed on appeal Menna, 423 U S at 62, 96 S Ct at 242 From Menna to Sherley and Gunter is a significant leap of

> logic and we now question its soundness A principal reason for doubting the soundness of the rule, in addition to the general reasons for requiring preservation, is the difficulty of analyzing a double jeopardy claim when there is no context from the trial court In such a circumstance, an appellate court must decide from the entire record whether double jeopardy principles have been violated on any one of multiple bases As such, appellant's counsel is at liberty to throw every possible double jeopardy theory at the Court without having had to analyze and present such claims in the trial court Deciding issues in such a manner is fraught with danger of error or omission and we can think of no compelling reason for such deference to double jeopardy principles As with other rights, constitutional rights may be waived by failure to timely and properly present the issue West v Commonwealth, Ky , 780 S W 2d 600, 602 (1989) ***Nevertheless, we will observe the Sherley rule in this case and address the merits of appellant's double jeopardy claim.***

Id , 922 S W 2d at 374 (emphasis added)

The "Sherley rule," as the Kentucky Supreme Court referred to it in Baker, is, in essence, a waiver of the Commonwealth's contemporaneous objection rule for double jeopardy issues The Supreme Court of Kentucky recently referred to this as a an exception to the usual rules of preservation in Brooks v Commonwealth, 217 S W 3d 219, 221-222 (Ky 2007), "[D]ouble jeopardy violations are treated as an exception to the general rules of preservation [A] double jeopardy violation may be reviewed on appeal regardless of a failure to raise it in the trial court "

This Court has held in the past that a State's contemporaneous objection rule

is an independent state rule that is entitled to deference Engle v Isaac, 456 U S 107, 128 (1982) ("Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights "), Wainwright v Sykes, 433 U S 72, 81 (1977) ("[I]t is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts ") For the same reasons, a State's waiver of its contemporaneous objection rule should be honored by the federal courts

Further, "This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment *See*, e g , Fox Film Corp v Muller, 296 U S 207, 210 (1935) " Coleman v Thompson, 501 U S 722, 729 (1991) "[A]n adequate and independent state procedural disposition strips this Court of certiorari jurisdiction to review a state court's judgment " Dretke v Haley, 541 U S 386, 392 (2004), *see*, e g , Murdock v Memphis, 20 Wall (87 U S) 590 (1874), Loftus v Illinois, 334 U S 804, 805 (1948), *cf* Adams v Robertson, supra The decision of the Supreme Court of Kentucky rests upon an adequate and independent state law ground

In it's Petition for Rehearing before the Supreme Court of Kentucky and in its Petition for a Writ of Certiorari before this Court petitioner makes dramatic

claims that the holding of the Supreme Court of Kentucky will lead to gamesmanship and sandbagging However, 33 years have elapsed since Sherley v Commonwealth, supra The Kentucky courts have reviewed unpreserved double jeopardy violations during that entire period of time The Supreme Court of Kentucky has obviously not observed the gamesmanship that petitioner has predicted would occur

Petitioner proposes that a defendant should be required to continue to argue and object, after a judicial ruling has been made, until the jury is finally discharged "[A] defendant has the opportunity to object until the jury is discharged, and his failure to do so constitutes consent" Petition for a Writ of Certiorari at 7 That rule would be disrespectful to the rulings of the trial court and would have negative consequences for courtroom decorum Parties would never know when they had objected enough Parties could never stop objecting for fear of being accused of consenting to a mistrial The Supreme Court of Kentucky rightly held that a party is not required to lodge further objection or make further argument after the trial court has made a ruling The Supreme Court of Kentucky's decision is reasonable

The Supreme Court of Kentucky has policy-making and administrative authority over the Kentucky Court of Justice KY R SUP CT 1 010 It is within the Kentucky Supreme Court's policy-making authority to decide whether the risk

of sandbagging defendants who fail to preserve double jeopardy issues is outweighed by the risk of lost decorum or any other value that court might see in allowing the waiver of its contemporaneous objection rule It is also within the Kentucky Supreme Court's policy-making authority to decide whether double jeopardy violations constitute palpable error under its procedural rules The Supreme Court of Kentucky has over 30 years of experience with the "Sherley rule" Its decision that double jeopardy violations qualify as palpable error under KY R CRIM P 10 26 is entitled to deference from this Court

CONCLUSION

The Petition for Writ of Certiorari should be denied

Respectfully submitted,

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(3)

NO 09-419

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RESPONDENT EDDIE CARDINE'S BRIEF IN OPPOSITION

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February 8, 2010

QUESTION PRESENTED

The question presented by Kentucky's certiorari petition is essentially one of state law. Is a state appellate court prohibited from applying a long-standing, adequate and independent state procedural rule permitting review of a double jeopardy claim on appeal when the defendant did not expressly object to the trial judge's *sua sponte* declaration of a mistrial, and, does this Court have jurisdiction to review a purely state law issue when Kentucky did not raise it on appeal?

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Sherley v Commonwealth, 558 S W 2d 615, 618 (Ky 1977) 11, 14

State v Bertrand, 587 A 2d 1219, 1225 (N H 1991) 14

State v Tolliver, 839 S W 2d 296 (Mo 1992) 16, 17

Terry v Commonwealth, 253 S W 3d 466, 470 (Ky 2007) 11

United States v Dinitz, 424 U S 600, 607-610 (1976) Passim

United States v Gantley, 172 F 3d 422 (6th Cir 1999) 16, 17

United States v Ham, 58 F 3d 78 (4th Cir 1995) Passim

United States v Nichols, 977 F 2d 972 (5th Cir 1992 16, 17

United States v Perez, 22 U S 579, 580 (1824) Passim

United States v Pietro, 936 F 2d 6 (1st Cir 1991) 14, 15

United States v Puelo, 817 F 2d 702 (11th Cir. 1987) 15, 16

United States v Toribio- Lugo, 376 F 3d 33 (1st Cir 2004) 15

United States v You, 382 F 3d 958, 964-965 (9th Cir 2004) 17

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Wisconsin Electric Company v Dumore Company, 282 U S 813 (1931) 19

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OTHER AUTHORITIES

CR 14 1(g)(i)	1, 7
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OPINIONS BELOW

The Kentucky Supreme Court is Opinion is reported as Cardine v. Commonwealth, 283 S.W.3d 641 (Ky. 2009). Petitioner's Appendix ("Pet. App.") 1a-24a. The Kentucky Supreme Court is Order unanimously and summarily denying the Petition for Rehearing was entered on June 25, 2009. Pet. App. 26a-27a.

JURISDICTION

28 U.S.C. §1257 provides certiorari jurisdiction over federal constitutional issues arising out of a final state court judgment. That jurisdiction does not exist here for two reasons: 1) the merits of the Question Presented by the Commonwealth of Kentucky ("Kentucky") was not fairly presented on direct appeal[1], and 2) the Kentucky Supreme Court's decision rested entirely on adequate and independent state law grounds.

STATEMENT OF THE CASE

Though Respondent Eddie Cardine ("Cardine") does not take issue with the chronological order of events summarizing the state court proceedings in the Commonwealth of Kentucky's ("Kentucky") Statement of the Case, Cardine will supply details that have been omitted by Kentucky, which have a direct bearing on this Court's jurisdiction.

On October 25, 2005, the parties appeared before the trial court for the purpose of selecting a jury to hear Kentucky's evidence concerning the criminal charges filed against the Respondents Eddie Cardine and Michael Curry. The jury was sworn in at

[1] Rule 14.1(g)(i) requires a petitioner, who is requesting review of a state court judgment, to specify when and how the federal claim was raised and passed upon in the state court(s), including specific references to the record. Kentucky has failed to comply with the requirements of this rule in their Statement of the Case.

approximately 5 00 p m and instructed to return the next day On the following morning, Kentucky disclosed a new witness - a man identified only as "Rob " The new witness was not discovered by Kentucky officials, but was identified to the prosecutors that morning by the mother of the young man whose death Cardine and Curry were on trial for causing No one from the prosecutor's office had spoken to Rob or knew Rob's surname at the time the witness's existence was first revealed When Rob was brought into court by authorities, he identified himself as Mr Hebert and told the court that he had no testimony to give in the matter

Before taking a break to allow counsel an opportunity to interview Rob, the trial judge indicated that she was inclined either to exclude the witness's testimony or to grant a continuance Counsel returned to the courtroom about an hour and a half later In addition to interviewing the witness during the break, the trial judge, counsel for Kentucky, and counsel for Curry indicated they had engaged in an off-the-record discussion over lunch concerning objections to the witness Specifically, the discussion focused on whether the witness ought to be excluded or if a 24-hour continuance would be a sufficient remedy Cardine's counsel was not present during the lunchroom discussion

Now on the record, counsel for Curry reiterated his lunchtime objection to the evidence by moving to exclude Mr Hebert's testimony Further, he indicated that if the court denied the motion to exclude, he would move in the alternative for a continuance Cardine's counsel then joined the motion to exclude the witness, on the same grounds In responding to the objections of counsel, Kentucky argued that Rob, whom they had not heard of until that morning, was a "crucial" witness in their case After finding that Rob was important to both the prosecution's case and the defense, the trial judge denied the motion to exclude the witness's testimony The judge then declared a mistrial *sua sponte* At a second trial, both Cardine and Curry were convicted of murder, complicity to attempted murder, and complicity to assault second degree

On direct appeal to the Kentucky Supreme Court, Cardine argued that the erroneous declaration of a mistrial resulted in a second trial being held in violation of his right not to be twice placed in jeopardy The issue being raised in Kentucky's Petition to this Court was not addressed in their Brief to the Kentucky Supreme Court In that pleading, Kentucky touched on preservation only as a matter of state law and only as though it was a preliminary matter of little significance

> The trial court declared a mistrial after appellant argued that he would be prejudiced by the disclosure of a new witness immediately prior to the commencement of proof, that a short continuance would not cure the prejudice and only exclusion **or in the alternative continuance to a new trial date would be proper The court then only granted what he asked for** and it was not an abuse of discretion to find a manifest necessity and declare a mistrial when the court did not have a certain date for the new trial **The claim is otherwise unpreserved and waived by the request for a new trial date**
>
> Respondent's Appendix ("Resp App ") 11a (emphasis added, internal citations omitted)

In its Opinion, the Kentucky Supreme Court rejected Kentucky's assertion that Cardine and Curry **expressly requested a mistrial** by asking for a continuance to a new trial date Petitioner's App 18a -19a Specifically, the Kentucky Supreme Court made a factual finding that when counsel for Cardine and Curry requested a continuance in the alternative to exclusion, counsel were actually seeking a continuance - not a mistrial *Id*[3]

[3] This interpretation of the majority Opinion (as well as Kentucky's argument in its direct appeal brief) is corroborated by the dissenting opinion adopted by two of the six Justices Pet App 24a-25a The dissent wrote as follows "By entering the mistrial, Appellants received the continuance each requested " *Id* In other words, the dissent was persuaded by the Commonwealth's argument that Respondents had expressly requested the mistrial The dissent did not make any findings with regard to waiver or implied consent

The Kentucky Supreme Court nevertheless found that Cardine was not barred, under controlling Kentucky case law interpreting the rules of preservation, from raising his double jeopardy claim on appeal Pet App 19a - 20a Further, the Kentucky Supreme Court found that pursuant to Kentucky's procedural rules, Cardine and Curry were not required to raise an objection upon retrial Pet. App 20a-22a. In short, the court applied Kentucky's long-standing procedural rule permitting review of double jeopardy claims on appeal under its palpable error standard[4] *Id* at 21a

Thereafter, Kentucky filed a Petition for Rehearing in the Kentucky Supreme Court At the tail end of Argument I of its Petition for Rehearing, Kentucky continued to press its previously unsuccessful argument that Cardine's request for a continuance was really an **express request for a mistrial** Kentucky wrote in relevant part

> **The Commonwealth lastly respectfully submits that the court has not fully considered the nature of the continuance requested by both defendants at the time the mistrial was declared in concluding that neither appellant asked for a mistrial.** In its brief, the Commonwealth had argued that the court then only granted appellant what he asked for For the benefit of the court, the Commonwealth has appended a transcription of those proceedings and an examination of the record or the transcription shows that both Cardine and Curry requested continuance of trial and neither asked for a simple continuance **It would not be unreasonable for the trial court to conclude therefrom that both were a request for a new trial which would necessitate a mistrial as opposed to merely a continuance** of the present trial because counsel had clearly distinguished their present request as something more than a continuance
> (emphasis added, internal citations omitted)

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[4] Kentucky Rule of Civil Procedure 61 02 provides "A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error "

Additionally, Kentucky asserted for the first time in Argument II of the Petition for Rehearing that the Kentucky Supreme Court "erroneously fail[ed] to consider or misconceive[d] the significant body of case law on why appellant's conduct constituted **implied consent** due to the fact that the defendants did not object to and otherwise acquiesced in the mistrial." To support their new theory of **implied consent**, Kentucky included citation to federal circuit court decisions to support their claim that the Kentucky Supreme Court had failed to consider or misconceived a significant body of case law on **implied consent**. Kentucky was correct in its statement that the court *did not consider* this body of case law, because none of those federal cases were cited in Kentucky's direct appeal brief as a basis for its objection to the court's consideration of Cardine's double jeopardy claim. Indeed, Kentucky cited absolutely no federal case law in its direct appeal brief opposing the relief sought by Cardine as a result of his double jeopardy claim. *See* Resp. App. 11a-13a.

Though the Kentucky Supreme Court's Opinion rendered on January 22, 2009 was split by a 4-2 vote, the court's decision to summarily deny Kentucky's Petition for Rehearing on June 25, 2009 was unanimous. *Compare* Pet. App. 1a-25a *with* Pet. App. 26a-27a.

REASONS FOR DENYING THE WRIT

I THE QUESTION PRESENTED IN THE PETITION WAS NEITHER RAISED ON APPEAL NOR DECIDED BY THE KENTUCKY SUPREME COURT.

Kentucky, in its direct appeal brief, argued that Cardine and Curry had **expressly sought declaration of a mistrial** when they asked for a continuance and for that reason alone had waived their right to appellate review of their double jeopardy claim. The Kentucky Supreme Court thoroughly addressed that argument on state procedural

grounds in its Opinion released in January 2009 Thereafter, in its Petition for Rehearing, Kentucky argued for the first time that the state court should have held that both Cardine's and Curry's failure to object, after the trial court declared a mistrial *sua sponte*, operated as an **implied consent**, thereby waiving any review of their double jeopardy claims under federal case law This issue was never decided by the Kentucky Supreme Court even though it is the sole basis for Kentucky's Petition for a Writ of Certiorari Given the procedural posture of this case, granting certiorari would be inconsistent with this Court's rule that federal claims not raised or addressed below will not be considered *See Howell v Mississippi, 543 U S 440, 443 (2005), Adams v Robertson*, 520 U S 83, 86 (1997), *Yee v City of Escondido*, 503 U S 519, 533 (1992), *Illinois v Gates*, 462 U S 213, 221 (1983), *Bailey v Anderson*, 326 U S 203, 206 (1945)

Aside from the rare and exceptional case, this Court has "adhered to the rule in reviewing state court judgments under 28 U S C § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review" *Adams v Robertson*, 520 U S 83, 86 (1997) The purposes underlying this rule are equally applicable to a "State's failure to have opposed the assertion of a particular federal right, as to a party's failure to have asserted the claim" *Illinois v Gates*, 462 U.S 213, 221 (1983) Specifically, the purposes underlying the rule are intended to provide a measure of assurance that (1) matters argued in this Court will arrive with an adequate record upon which to consider the claim, (2) the proper respect between our dual court system is observed by permitting state officials the first opportunity to consider and address the constitutional question, and (3) state courts will be permitted to rest their decisions on

adequate and independent state grounds where appropriate *Id*, *see also Webb v Webb*, 451 U S 493, 500 (1981)

As will be argued at greater length in Section II below, the Kentucky Supreme Court reviewed Cardine's double jeopardy claim under a long-standing state procedural rule regulating preservation in state courts Thus, accepting certiorari in this case would lead to the precise result the rule was intended to prevent a disruption of the balance between state and federal courts raising serious concerns over comity

When the Opinion of the highest state court is silent on a federal constitutional question that has been pressed on review to this Court, the burden to show that the federal question was properly presented to the state court rests with the Petitioner *See Adams v Robertson*, 520 U S 83, 86-87 (1997) Kentucky has failed to meet that burden in this case because they have not previously and cannot now cite to specific references in their direct appeal brief wherein the issue of **implied consent** was raised *See* Resp App 1a-19a Kentucky's failure to provide those citations in its Petition violates this Court's Rule 14 1(g)(i)

Simply, Kentucky made no attempt to argue any federal-law-based-objection in response to Cardine's request for appellate review of his double jeopardy claim in the state court Though the current Petition is very specific, Kentucky never argued in its direct appeal brief that by failing to object, Cardine and Curry had **impliedly consented** to the *sua sponte* declaration of a mistrial Instead, Kentucky asserted that the request for a continuance (in the alternative to exclusion of the witness) should not have been taken literally as a request for a continuance Rather, it was correctly interpreted by the trial court as an **express request for a mistrial** The Kentucky Supreme Court rejected

Kentucky's objection to review of Cardine's double jeopardy claim and made the following finding of fact in their January 2009 Opinion

> [N]either Appellant asked for a mistrial Appellants requested the alternative relief described above exclusion of the new witness or continuance to another date A mistrial is not a substitute for a continuance, which the Commonwealth seems to imply, because it excuses the current jury from the case, whereas a continuance postpones the trial but keeps the same jury

Pet App 18a Nowhere in its direct appeal brief did Kentucky object to Cardine's double jeopardy claim by asserting a specific federal claim based upon an allegation of **implied consent** to the mistrial Accordingly, this Court should apply the rule and deny certiorari here, where Kentucky has failed to properly raise the same objection in the state court proceedings as it has set forth in its current Petition

Moreover, the Kentucky Supreme Court did not pass upon the question now presented in this Court Even though Kentucky eventually included a federal-law-based-objection in its Petition for Rehearing, the Kentucky Supreme Court did not decide that issue Kentucky Rule of Civil Procedure, Rule 76 32(1)(b) [6] provides in relevant part

> (b) Except in extraordinary cases when justice demands it, **a petition for rehearing shall be limited to consideration of the issues argued on the appeal** and will be granted only when it appears that the court has overlooked a material fact in the record, or a controlling statute or decision, or has misconceived the issues presented on the appeal or law applicable thereto.

[6] Kentucky's Civil Rules of Procedure are applicable to appeals from criminal convictions pursuant to RCr 13 04, which provides for the application of civil rules where not superseded or inconsistent with criminal rules

CR 76 32(1)(b)(emphasis added) Thus, Kentucky's attempt to present the federal issue for the first time in a rehearing petition is insufficient to preserve the claim for this Court's review, unless the Kentucky Supreme Court had granted rehearing and addressed the issue It did not Pet App 26a-27a

While Kentucky stated correctly in its Petition for Rehearing that the Kentucky Supreme Court did not consider[7] a federal-law-based-objection in their Opinion, the failure to consider was not erroneous There was absolutely no federal argument or law presented to the Kentucky Supreme Court on this issue in Kentucky's direct appeal brief *See* Resp App 11a-13a Thus, Kentucky's attempt to raise this issue for the first time in its Petition for Rehearing was contrary to Kentucky's court rules and procedures *See* CR 76 32(b), *Reed v Reed*, 457 S W 2d 4, 7 fn 1 (Ky 1970)[8] And the state court's denial of that Petition for Rehearing was not an expression of its Opinion on the merits of the Commonwealth's newly presented federal-law-based-objection *Cf Commonwealth v Ledger*, 955 S W 2d 539, 542-43 (KY App 1997)(rejecting appellant's claim that the Kentucky Supreme Court's denial of Petition for Rehearing pursuant to CR 76 32(1)(c) addressed the matter of attorney's fees on the merits, since that issue could not have been considered on rehearing when it was not a "matter in issue" on appeal)

Since Kentucky failed to raise its federal-law-based-objection for the Kentucky Supreme Court's review of Cardine's double jeopardy claim prior to the issuance of the

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[7] Kentucky asserted in its Petition for Rehearing filed pursuant to CR 76 32(1)(b) that the Kentucky Supreme Court "erroneously fail[ed] to consider or misconceive[d] the significant body of case law "

[8] Though the *Reed* court was interpreting RCA 1 350(b), the 1969 version of the rule referenced in that case contained exactly the same language as is set forth in today's version of the court rule governing Petitions for Rehearing, which can be found at CR 76 32(1)(b) *Compare* RCA 1 350(b) effective September 1, 1968 *with* CR 76 32(1)(b), effective January 1, 1978

state court's Opinion on the merits, certiorari must be denied pursuant to the long-standing rule that objections to federally based rights not presented or decided by the state court are inappropriate for review in this Court *See Illinois v Gates*, 462 U S 213, 221 (1983)

II. THIS COURT LACKS JURISDICTION BECAUSE THIS CASE WAS DECIDED ON INDEPENDENT AND ADEQUATE STATE LAW GROUNDS.

This Court lacks jurisdiction to review a final judgment from the Kentucky Supreme Court that was decided on independent and adequate state law grounds *See Coleman v Thompson*, 501 U S 722, 729 (1991) The question Kentucky seeks to have this Court resolve in its favor is "[w]hether the double jeopardy clause bars the retrial of defendant after the trial court *sua sponte* declares a mistrial absent manifest necessity and the defendant does not object prior to the actual discharge of the jury " However, the appellate issue raised in the state court was whether Cardine's double jeopardy claim could be reviewed on appeal absent an express objection after the trial court *sua sponte* declared a mistrial The Kentucky Supreme Court's ruling was grounded entirely in a long-standing state court procedural rule Kentucky never argued that review of this issue on appeal was barred by federal law and the Kentucky Supreme Court holding was based on independent and adequate state law grounds

In its direct appeal brief, Kentucky's argument in opposition to Cardine's double jeopardy claim was that Cardine had **expressly requested a mistrial** by asking for a continuance (in the alternative to exclusion of the newly identified witness), hence, Cardine's double jeopardy claim could not be reviewed on appeal *See* Resp App 11a-13a Citing absolutely no state or federal authority for its argument, Kentucky made the additional vague claim that review on appeal was unwarranted because "[t]he claim is otherwise unpreserved and waived by the request for a new trial date " *Id* In its

Opinion, the Kentucky Supreme Court held as a factual finding that Cardine and Curry had not **expressly requested a mistrial** *See* Pet App 18a

The Kentucky Supreme Court went on to hold that under the state's criminal rules of procedure and controlling state case law, Cardine need not object to the *sua sponte* declaration of a mistrial in order to have his double jeopardy claim reviewed on appeal *See id* at 19a-20a Finally, the state court held that Cardine's double jeopardy claim was properly before the court for appellate review, even though he had not objected at the time of retrial *See* Pet App 21a-22a Again, the Kentucky Supreme Court cited a longstanding and repeatedly upheld state court principle that appellate review of double jeopardy claims would be exercised, even in the absence of an objection by the defendant *See id*, *citing Terry v Commonwealth*, 253 S W 3d 466, 470 (Ky 2007), *Beaty v Commonwealth*, 953 S W 3d 196, 210 (Ky 2003), *Grundy v Commonwealth*, 25 S W 3rd 76, 85 (Ky 2000), *Gunter v Commonwealth*, 576 S W 2d 518, 522 (Ky 1978), *Sherley v Commonwealth*, 558 S W 2d 615, 618 (Ky 1977)

Kentucky asks this Court to ignore the state court's application of its own procedural rules and find that the Cardine's double jeopardy claim is barred Granting certiorari in these circumstances would be contrary to the principles adhered to by this Court "from the time of its foundation" that "judgments of state courts that rest on adequate and independent state grounds" will not be reviewed *Herb v Picairn*, 324 U S 117, 125 (1945) This principle has been enforced uniformly based upon both substantive and procedural state law grounds *See Coleman v Thompson*, 501 U S 722, 729 (1991) The Kentucky Supreme Court made clear that a long standing state procedural rule provided the authority to review Cardine's double jeopardy claim on appeal This Court should not upset a state court judgment that rests on independent and adequate state law grounds – particularly when as here, Kentucky failed to assert any federal basis for its claim in the state court proceedings

III. THERE IS NO ACTUAL CONFLICT BETWEEN THE CARDINE OPINION AND THOSE OF OTHER STATE COURTS OF LAST RESORT OR FEDERAL COURTS OF APPEAL.

Kentucky's petition for a writ of certiorari should be denied because no "compelling reason" to grant that petition has been advanced *See* Supreme Court Rule 10 Kentucky's claim that there is a conflict between the opinion of the Supreme Court of Kentucky and decisions of federal courts of appeal and state courts of last resort is illusory In fact, all of the courts Kentucky cites articulate and follow the same legal principles They simply reach different conclusions about whether a retrial is barred by the double jeopardy clause based on the specific circumstances of the cases before them Cardine's case does not merit a grant of certiorari

Advancing its claim that a conflict among the courts warrants a grant of certiorari, Kentucky summarizes the law concerning when the government can retry a defendant following the declaration of a mistrial without offending the double jeopardy clause, citing several key cases decided by this Court *United States v Perez*, 22 U S 579, 580 (1824), *United States v Dinitz*, 424 U S 600, 607-610 (1976), *Arizona v Washington*, 434 U S 497, 505 (1978), and *Oregon v Kennedy*, 456 U S 667, 676 (1982) *See* Petition at 6 In *Perez* this Court first held that a mistrial declared without the consent of the defendant does not present a double jeopardy bar to a second trial if there was a "manifest necessity" for the ruling This Court held in *Dinitz* that a mistrial declared on motion of defense counsel did not bar retrial unless the mistrial motion was induced by bad faith conduct by the judge or prosecutor 424 U S at 611-612 In *Arizona v Washington* this Court held that a mistrial declared because of misconduct by the defense

did not bar retrial on double jeopardy grounds, finding there was manifest necessity for the ruling although the trial court had not specifically made such a finding 434 U S at 515-517 In *Oregon v Kennedy* this Court held that a mistrial declared on motion of the defendant after the prosecutor called him a crook did not bar retrial on double jeopardy grounds when the trial court specifically found the prosecutor did not intend to provoke a mistrial 456 U S at 671-679

Kentucky cites *Dinitz*, a case where defense counsel moved for a mistrial, for the principle that a defendant who consents to a mistrial may be retried even if there was no manifest necessity for declaring the mistrial *See* Petition at 6-7 Kentucky then frames the issue in this case as "whether a defendant consents to a mistrial by failing to object after the trial court *sua sponte* declares one" *See* Petition at 7 Kentucky asserts that numerous other courts have answered that question affirmatively and that the Kentucky Supreme Court's contrary conclusion warrants this Court's review[9] *See* Petition at 7-14

In fact, there is no actual conflict between the Kentucky Supreme Court's opinion and the decisions of the federal courts of appeal or another state court of last resort The Supreme Court of Kentucky properly articulated the law concerning double jeopardy claims following a *sua sponte* mistrial declaration and then applied the law consistently with Kentucky's long-standing rule permitting review of double jeopardy claims even in the absence of an objection in the trial court, noting that Kentucky has held for more than thirty (30) years that lack of preservation "should not result in permitting a double jeopardy conviction to stand" *Dixon v Commonwealth*, 263 S W 3d 583 (Ky 2008),

[9] Cardine asserts that Kentucky did not raise this "implied consent" issue in the Kentucky Supreme Court and that court did not reach the issue *See* Argument I However, for the purpose of this argument, Cardine will assume the court found a lack of implied consent

quoting *Sherley v Commonwealth*, 558 S W 2d 615, 618 (Ky 1977), *overruled on other grounds* by *Dixon v Commonwealth, supra*

Kentucky cites decisions by the First, Second, Third, Fourth, Fifth, Sixth, Seventh and Ninth Circuit Courts of Appeal as well as decisions from New Hampshire, Florida[10], Massachusetts and Missouri state courts and contends that there are several different standards being followed but that only the New Hampshire Supreme Court and the Florida Court of Appeals have agreed with the Kentucky Supreme Court that failure to object following *sua sponte* declaration of a mistrial does not amount to consent *See* Petition at 8-13 In fact, all of those courts, including the Kentucky Supreme Court, have properly articulated the rules concerning when the double jeopardy clause bars a retrial following a *sua sponte* mistrial declaration and simply applied those rules differently based on the particular circumstances of the cases before them There is no actual conflict warranting review

Kentucky first cites *United States v Pietro*, 936 F 2d 6 (1st Cir 1991) and *Camden v Circuit Court of Second Judicial Circuit, Crawford County, Ill* , 892 F 2d 610 (7th Cir 1989), as support for the position that "a defendant does have the opportunity to object following a court's *sua sponte* mistrial declaration and that failure to object constitutes consent" *See* Petition at 8-9 The *Camden* court cited *United Sates v Perez*, 22 U S 579, *Arizona v Washington*, 434 U S 497, *United States v Dinitz*, 424 U S 600,

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[10] Kentucky cites *State v Bertrand*, 587 A 2d 1219, 1225 (N H 1991) and *Joseph v State*, 988 So 2d 133, 135 (Fl App Ct 2008) as holding that "a defendant's failure to object following the *sua sponte* declaration of a mistrial does not amount to consent" *See* Petition at 8 *Joseph* is not a decision of a state court of last resort, and the appellate court relies almost exclusively on state cases *Bertrand* involves a court's *sua sponte* mistrial declaration prompted by repeated misconduct by the prosecutor, with the defense requesting dismissal rather than a mistrial The New Hampshire Supreme Court cited *Perez, supra, Dinitz, supra* and *Arizona v Washington, supra*, analyzed the circumstances surrounding the declaration and held that the defense did not consent to the mistrial 587 A 2d at 1224-1225

and *Oregon v Kennedy*, 456 U S 667 and stated that the double jeopardy clause would only permit retrial "if defense counsel's conduct constituted implied consent or if the mistrial decision was supported by manifest necessity" since Camden neither requested nor expressly consented to the mistrial 892 F 2d at 614 Analyzing the circumstances surrounding the *sua sponte* declaration of a mistrial, the Seventh Circuit found implied consent, referring to "the unique circumstances of this case" *Id* at 617-618 Citing *Camden* and the same opinions of this Court on which the *Camden* court relied, the First Circuit in *United States v Pietro*, articulated the same standard for consent the Seventh Circuit had outlined in *Camden*, analyzed the circumstances surrounding the *sua sponte* mistrial declaration and found implied consent 936 F 2d at 8-12[11]

Kentucky next cites *United States v Ham*, 58 F 3d 78 (4th Cir 1995), *United States v Puelo*, 817 F 2d 702 (11th Cir 1987), and *Pellegrine v Commonwealth*, 844 N E 2d 608 (Mass 2006) as applying "a similarly strict standard" concerning the necessity of objecting if there is an opportunity to do so lest consent be implied *See* Petition at 10 However, *United States v Ham*, does not address a Double Jeopardy Clause claim involving a mistrial *See* 58 F 3d at 83-84 The issue before the appellate court was the failure of the lower court to try a discrete issue before the jury, and the Fourth Circuit borrowed the double jeopardy rules that apply when mistrials occur, citing *Camden*, *Pietro* and other federal cases *Id* Based on the facts surrounding the failure to submit the issue to the jury, the court found implied consent by the defendant *Id* at 84

[11] The First Circuit clearly analyzes these issues on a case by case basis, focused on the facts surrounding the claim *See United States v Toribio-Lugo*, 376 F 3d 33 (1st Cir 2004) where the First Circuit reversed the lower court and held a retrial was barred on double jeopardy grounds when the court had declared a mistrial *sua sponte* and there was no objection by the defendant

United States v Puelo involves declaration of a mistrial based on a jury being unable to reach a verdict after the trial judge announced his intention to take that action if further deliberations were not fruitful 817 F 2d at 705-706 Thus, *Puelo* does not involve a *sua sponte* mistrial declaration And, once again, the decision was based on the particular facts of the case Neither *Ham* nor *Puelo* even addressed the issue which was decided by the Kentucky Supreme Court *Pellegrine v Commonwealth*, 844 N E 2d 608 (Mass 2006) involves a trial court granting a mistrial on its own initiative and then determining a second trial was not barred by the Double Jeopardy Clause based on the facts of the case No different rule than the one articulated in *Camden* and *DiPietro* is espoused

Continuing with its conflicting standards claim, Kentucky describes the Second, Fourth and Sixth Circuits as applying a "totality of circumstances" test to determine whether a defendant consented to a mistrial by failing to object, citing *Maula v Freckleton*, 972 F 2d 27 (2nd Cir 1992), *United States v Nichols*, 977 F 2d 972 (5th Cir 1992) and *United States v Gantley*, 172 F 3d 422 (6th Cir 1999) as well as *State v Tolliver*, 839 S W 2d 296 (Mo 1992) *See* Petition at 10-11. Like *United States v Ham*, 58 F 3d 78, *Maula v Freckleton*, a *per curiam* opinion, does not address a double jeopardy clause issue involving a mistrial 972 F 2d at 28-29 The lower court failed to submit certain charges to the jury, and the Second Circuit borrowed the double jeopardy rules that apply when mistrials occur and decided consent to non-submission occurred based on the circumstances *Id* *United States v Nichols*, 977 F 2d 972, also a *per curiam* opinion, does address a *sua sponte* mistrial declaration and the Court found implied consent to the mistrial based on the circumstances, following the same legal

principles articulated by the other federal courts of appeal which have been previously discussed *State v Tolliver*, 839 S W.2d 296, likewise involves *sua sponte* declaration of a mistrial, and the Court cites *Camden, Puelo, DiPietro* and the usual four opinions of this Court before concluding that the defendant impliedly consented to the mistrial

In *United States v Gantley*, 172 F 3d 422 the Sixth Circuit addressed a double jeopardy clause claim based on a court's declaration of a mistrial precipitated by the defendant's misconduct *Id* at 425-426 That Court stated "this Court's test for whether a defendant has impliedly consented to a mistrial is not materially different from the test used by other Circuits" *Id* at 429 [12] The Court further noted that "this Circuit simply insists on an especially careful examination of the totality of the circumstances, to ensure a defendant's consent is not implied when there is a substantial question of whether the defendant did, in fact, consent" *Id* at 428-429 The Court then held the defendant had given implied consent to the mistrial *Id* at 429

Kentucky next cites *Love v Morton*, 112 F 3d 131 (3rd Cir 1997) to support a court's looking "to specific factors that illustrate consent," and *United States v You*, 382 F 3d 958, 964-965 (9th Cir 2004) to indicate implied consent "only where the circumstances positively indicate a defendant's willingness to acquiesce in the mistrial order" (Petition at 11) In *Love* the Third Circuit cited the usual four opinions of this Court as well as *DiPietro, Camden, Puleo, Nichols* and *Ham*, all *supra*, and then refused to infer consent to the *sua sponte* mistrial declaration based on the circumstances of the case 112 F 3d at 136-139 The Ninth Circuit in *You*, relying on its own precedents, reviewed the circumstances surrounding the mistrial ruling, including counsel for the

[12] In *United States v Ham*, 58 F 3d at 83-84 and fn 3, the Fourth Circuit cited *United States v DiPietro*, 58 F 3d at 936 F 2d at 10-11, and noted that the First Circuit "has concluded that the Sixth Circuit has actually not set a different standard"

defendant declining the court's invitation to "make a record" concerning that ruling, and found implicit consent to the mistrial 382 F 3d at 962, 964-965

Kentucky boldly claims that "had the Kentucky Supreme Court analyzed this case using any of the standards regarding implied consent applied in the federal circuits, the court would have upheld the convictions" *See* Petition at 13 First, the federal courts of appeal and the state courts of last resort are all using the same standard As outlined above, all federal courts of appeal cite to the same core opinions of this Court and then simply analyze whether there was implied consent to a *sua sponte* mistrial declaration based on the particular circumstances surrounding the declaration Likewise, the Kentucky Supreme Court cited *Perez*, *Dinitz* and *Arizona v Washington* and articulated the proper rule of law

> "Once jeopardy attaches, prosecution of a defendant before a jury other than the original jury or contemporaneously-impaneled alternates is barred unless 1) there is a 'manifest necessity' for a mistrial or 2) the defendant either requests or consents to a mistrial "
> Pet App at 9a, quoting *Commonwealth v Ray*, 982 S W 2d 671, 673 (Ky App 1998)

The Kentucky Supreme Court then analyzed the circumstances surrounding the trial court's grant of a mistrial, including Cardine's request for exclusion of the late-discovered witness or a continuance, cited to RCr 9 22 concerning a party's failure to object when there is no opportunity to do so not thereafter prejudicing the party, and found Respondents Cardine and Curry "did not consent to the trial court's declaration of a mistrial " *See* Pet App at 18a-20a The Kentucky Supreme Court properly applied the same rule of law applied by the courts in the cases cited by Kentucky which supposedly conflict with Kentucky Supreme Court's opinion In fact, the Kentucky

Court specifically rejected the Kentucky's assertion that there was **express consent** to the declaration of a mistrial in this case And the Court declined to pass on the "implied consent" argument set forth in the Petition for Rehearing Thus, there is no actual conflict created by the Kentucky Supreme Court's opinion here

This Court has dismissed writs of certiorari as improvidently granted if it discovers that, on further examination, there was not a conflict on an important legal issue which warranted the Court's review *See Wisconsin Electric Company v Dumore Company*, 282 U S 813 (1931) In *Layne & Bowler Corporation v Western Well Works*, 261 U S 387, 392-393 (1923) this Court stated

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals

No actual conflict exists among the federal courts of appeal and state courts of last resort cited by Kentucky Instead, all of those courts articulate the same underlying legal rule and then reach different outcomes based on the particular circumstances of the cases before them The petition for a writ of certiorari should be denied

CONCLUSION

The Petition for Writ of Certiorari should be denied

Respectfully submitted,

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